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End of Elopements?

RECOMMENDATION for reciprocal enforcement of orders for custody or wardships by English, Scottish and Northern Irish courts is made by the Committee on Conflicts of Jurisdiction Affecting Children in its report published last week (Cmnd. 842, 1s. 3d.). The Committee, whose chairman was Lord Justice HODSON, expresses the view that enforcement of such orders should, *mutatis mutandis*, be on the lines of the Maintenance Orders Act, 1950, and that similar legislation is required to cover not only custody orders but all orders affecting the care of the child, including access, religious upbringing and education. The report contains a useful survey of the basis of jurisdiction over children as exercised in England, Scotland and Northern Ireland. The recommendation that there should be a pre-eminent jurisdiction which should be the ordinary residence of the child at the time of the application was not unanimous as Mr. MICHAEL ALBERY, Q.C., for reasons set out in a Note of Dissent, would prefer the test to be that of last joint home in the United Kingdom. The report deserves careful consideration. There should be greater co-operation between the courts of the United Kingdom in matters affecting children, and opportunities for "legal kidnapping" as a result of conflicts of jurisdiction should be eliminated. Although few will disagree, we imagine that there will be a tinge of regret amongst popular newspapers and their readers at the prospect of the disappearance of exciting and romantic elopement stories.

Refusal of Refreshment

IN a letter to *The Times* (16th September), Mr. DAVID LE VAY complained that on an unbearably hot and stuffy evening he was refused permission in two Soho restaurants to remove his coat and, in consequence, he was compelled to take his custom elsewhere. We assume that he was told that he would not be served if he removed his coat, and the writer asked "How legal is this sartorial compulsion by restaurateurs?" An innkeeper is bound by common law or custom of the realm to receive and lodge in his inn all travellers and to provide meals for them, at reasonable prices, unless he has reasonable grounds for refusing to do so. Section 1 (3) of the Hotel Proprietors Act, 1956, defines an "inn" (the Act uses the word "hotel") as "an establishment held out by the proprietor as offering food, drink and, if so required, sleeping accommodation, without special contract, to any traveller presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit state to be received." It

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would seem that restaurants in Soho are not "inns" and, therefore, that the restaurateurs were entitled to refuse to serve Mr. Le Vay. However, if it could be established that he was a "traveller" and shown that he had presented himself at an "inn," a more difficult question would arise. It is clear that an innkeeper may refuse refreshment to a traveller if he has reasonable grounds for so doing (see, e.g., *R.* v. *Rymer* (1877), 2 Q.B.D. 136), but whether or not the state of the traveller's dress, or lack of it, may constitute "reasonable grounds" is open to doubt. In *Pidgeon* v. *Legge* (1857), 21 J.P. 743, it was said that a chimney sweep in his working clothes could be refused refreshment in an inn, but the court took the opposite view in *R.* v. *Sprague* (1899), 63 J.P. 233, in relation to a lady in "rational" cycling costume. Indeed, in that case, the chairman of Surrey Quarter Sessions said: "An innkeeper could not refuse to supply food because of the particular shape of the dress of the traveller." We would be surprised if a court held that an innkeeper was entitled to refuse refreshment to a traveller on the ground that he (the traveller) had removed his jacket, but the class of the hotel in question might be a factor to be taken into account.

LETTER FROM SCARBOROUGH

Monday morning.

THE keynote of Sir Sydney Littlewood's inaugural address in the Spa Grand Hall this morning was friendship. By way of a beginning, when in future he writes a letter to a fellow solicitor (unless it is one of a highly official character beginning "Dear Sir"), it will begin, for example, "Dear Jones" however high or low Jones may be. The letter in reply will begin "Dear Littlewood": no "Sir Sydneys" are expected.

In conveyancing it is not difficult to be friendly: in litigation it is not always so easy. Those who become involved in litigation need their solicitors as friends to guide them as well as lawyers to advise them. Equally, the opposing solicitors should be friends, because the interests of the clients demand that all possibilities of compromise and settlement should be explored. In the vast field known as Sched. II, which Sir Sydney described as the most important sphere of a solicitor's activities, the solicitor must not only know his law but also understand business, understand men and have that knowledge of his client's affairs which comes only when two people can talk on terms of friendship.

Friendship of course is not enough. We must be expert in our job, although that does not mean that we need lose the human touch. Sir Sydney enjoyed himself throwing out several radical proposals which will be discussed in greater detail this afternoon and afterwards. For example, he suggested that not only should we be more selective in our choice of articled clerks but more particular in approving their principals. It is difficult to see exactly on what basis the Council would be able to vet those proposing to take articled clerks and we forecast that it will be some time before this particular change is made.

In finding new recruits to the profession we are in a dilemma. It is difficult to advise able young men and women to become articled clerks when the financial rewards are low and working conditions poor when compared with those which industry offers. Sir Sydney suggested that our minimum standard should be no lower than that required by the universities, that all potential solicitors should be intellectually able, if they were so minded, to enter a university. Yet industry offers selected graduates £600 a year while they are training and a firm salary afterwards. If we are to do the same our remuneration must be increased. Our overheads are still increasing—a fact of which, Sir Sydney reminded us, taxing masters take no notice.

One of the ways in which we can increase our remuneration and thus enable ourselves to attract the ablest young men and women into our ranks is by improving our efficiency. We all have sickly consciences on this subject. How long is it since you who are reading this read even a chapter in a legal text-book, let alone the whole book? Coming down to earth with a bang, how high is your pile of SOLICITORS' JOURNALS whose riches remain untapped? The pressure of keeping ahead of our outgoings is such that it is rare for us to spare the time to study methodically. This means that we are living on our seed corn. To keep up to date calls for individual effort combined with help from our professional body, in the form, for example, of refresher lectures, whether heard or read, and week-end courses. The Council would like to know what more can be done and invite suggestions. The minority of solicitors who are here will make some: the great majority who are absent are urged to tell the Council how our post-graduate training can be improved. Some months ago we published an account of a week-end course organised at Oxford by the Hertfordshire Law Society. This idea is capable of development and extension.

We do not like Sir Sydney's suggestion of post-graduate diplomas for specialised subjects like town planning, advocacy, taxation and agricultural law. In practice, the reputations of those who specialise in a particular field grow without adding letters after their names. Another suggestion we do not like is that eminent solicitors should "take silk" and become "Queen's Solicitors."

Going back for a moment to the training of the articled clerk, Sir Sydney bluntly described the approved law schools as "almost useless." There is a place for the academic teacher of law and another for the practical instructor. What is melancholy is the deep gulf which exists between the two. A hasty visit to New College, Oxford, last week where the Society of Public Teachers were holding their annual meeting, revealed an astonishingly large corps of professors, readers and lecturers. It is a pity if they cannot be used for practical as well as for academic purposes. Sir Sydney thinks that two more Lancaster Gates are necessary—one in the north and one in the west.

Among our guests is Mr. Gerald Gardiner, Q.C. This is the first occasion on which the Chairman of the Bar Council has attended our Annual Conference as a guest. This is significant. Sir Sydney is opposed to fusion, but he recognises that we must work much more closely with the Bar.

We hope that Sir Sydney's friendly gestures will be answered. As we have said, his only unfriendly remarks were directed towards the taxing masters and the approved law schools. Some lawyers, professors, barristers and solicitors, have spent too much energy in the past in denigrating those who should be their friends. We hope that Sir Sydney will be able to demolish some at least of the psychological barriers which obstruct our ways.

P. ASTERLEY JONES.

THE LEGITIMACY ACT, 1959

LIKE other discerning sections of the public, readers of this journal will have been aware of the adventurous passage through Parliament of the Bill which has now become the Legitimacy Act, 1959. They will know, too, that the principal controversy, which took place in the House of Lords, centred on the proposal which has passed into law as s. 1 of the new Act—the section that, by repealing a restrictive provision in the principal section of the 1926 Act of the same name, legitimates a person whose parents subsequently marry, even though (and this is the novelty so far as English law is concerned) his mother or father may have been married to a third person at the time of his birth. It needs to be emphasised, perhaps, that that is by no means the only innovation with which the recent Act faces us, but it will be convenient to consider the sections in numerical order.

Although the Act received the Royal Assent on 29th July, its operation is suspended for a period of three months from its passing. The 29th October, 1959, then, is a date destined to assume importance in the future determination of the personal status of an unknown, and possibly considerable, number of persons, and in relation to the rights and obligations of many other persons besides.

Categories of legitimate persons

In the few weeks that remain before the date mentioned, it will be profitable to remind ourselves of the effect of statutory legitimation, and to see how the new law will fit in with the old. To begin with, it is worth recapitulating the distinction between "legitimate" and "legitimated." The status conferred by the English Acts of 1926 and 1959 is not retrospective so as to render the person in question legitimate from birth. He is not "made legitimate" as is a person whose status in corresponding circumstances falls to be decided in accordance with some foreign systems of law—systems which English law recognises as determinative when the requisite foundation of domicile is present. The effect of English statutory legitimation is not so much to legitimate as to confer, as from a date which may be an arbitrary one, rights similar in stated respects to those of legitimate persons.

The relevant date, in the case of a person whose parents marry after the date of his birth, each of them having been single at that time, is the date of the marriage or 1st January, 1927, whichever is the later; such a person is "legitimated" by s. 1 of the 1926 Act as originally enacted. But if the parents were, or either of them was, married (otherwise than to each other) at the time of the birth, then the legitimation is by virtue of the amendment effected by the 1959 Act, and dates from the marriage or from 29th October next, as the case may be.

There are, in fact, to be no less than six classes of person whom English law will regard as having legitimate status: (*a*) those born legitimate, or deemed so under s. 9 of the Matrimonial Causes Act, 1950, mentioned later; (*b*) those treated as legitimate under s. 2 of the new Act, which is fully discussed below; (*c*) persons made legitimate as from birth by the law of a foreign country which recognises legitimation *per subsequens matrimonium* in this full sense, being a country in which the father was domiciled both at the time of the birth and at the time of the parents' marriage (see *Re Grove* (1888), 40 Ch. D. 216; *Re Luck's Settlement Trusts* [1940] Ch. 864); (*d*) persons legitimated by statute under s. 1 of the Legitimacy Act, 1926, in its original form; (*e*) those statutorily legitimated under s. 8 of the Act of 1926, namely persons legitimated by virtue of a subsequent marriage under the law of a country where the father was domiciled at the time of the marriage, but not at the time of the birth, so as not to fall within (*c*) above; s. 8 recognises these persons as legitimated as from the marriage, or 1st January, 1927, if later; (*f*) those legitimated by s. 1 of the 1959 Act.

The consideration of rights of succession and other proprietary rights will frequently involve differentiation between these categories of legitimacy.

Children of void marriages

Important as the new statutory legitimation by subsequent marriage undoubtedly is, it scarcely deserves to overshadow the other reforms introduced by the new Act, also from 29th October this year.

By s. 2 a further step is taken in relief of that unfortunate class of children who may be said to be bastardised by the English common law. These are children the circumstances of whose birth appear to be those of ordinary legitimacy—the world sees them as the children of a normal marriage—but who, when the law is consulted, or some legal process invoked, find that the marriage on which their legitimacy depends is swept away by avoidance or annulment. (A dissolved marriage is not, of course, here in question: divorce has never bastardised the issue.) Originally the rule was quite strict, as *Dredge* v. *Dredge* [1947] 1 All E.R. 29 and other cases showed. If a legitimate child is one born in wedlock, then when the law discovers or declares that given circumstances did not amount to wedlock, there is no logical alternative to holding that the child born or appearing to be born (*R.E.L.* v. *E.L.* [1949] P. 211) of the union that turns out not to have been a marriage is not a legitimate child.

A statute of 1949 (now embodied in s. 9 of the Matrimonial Causes Act, 1950) repaired part of that legal wrong to the innocent child by declaring that when a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

The two points to note about this halfway reform of 1949 are, first, that this is not legitimation in the restricted sense explained above; the child is deemed always to have been legitimate and falls into our category (*a*). He is confirmed in a status that everybody assumed he always had.

Secondly, the section deals only with voidable marriages which have in fact been annulled by decree. Non-consummation through impotency or wilful refusal of intercourse, inducement by threats, fear or duress, pregnancy by another not known to the husband at the time of the marriage, insanity not so found or intoxication at the ceremony, and venereal disease in a communicable form—these are matters which render a marriage voidable. The case of a marriage which, by contrast, is in truth void *ab initio* is best illustrated by the example of a bigamous marriage; other examples cited to their lordships during the debates on the Bill are those of mistake as to identity or as to the nature of the ceremony, insanity so found by inquisition, consanguinity or affinity of the parties, lack of age, non-observance of due form and sham marriages.

The apparent child of a void marriage is not reached by the Matrimonial Causes Act, even though a decree of nullity may have been pronounced. His situation is the one at which the new s. 2 is aimed. Broadly, the child of a void marriage, whether born before or after 29th October, 1959, is on certain conditions to be treated as the legitimate child of its parents. Again the section confers, subject to what is said below, the full status of legitimacy; it does not merely give the child an equivalent status as from a given date.

The conditions in s. 2

The section applies, and applies only, to children whose fathers were domiciled in England at the time of the birth, or in the case of posthumous children, immediately before the father's death (subs. (2)).

The principal condition turns on the state of mind of the parents. It is expressed in this way: "If at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, if later) both or either of the parents reasonably believed that the marriage was valid" then the child is to be treated as legitimate. Some criticism of this piece of draftsmanship was answered by the Lord Chancellor with the advice that the words were apt to cover two cases. If the child was conceived after the marriage the material time would be the time of the intercourse. But if the child was conceived before the marriage then one would have to look to the reasonable beliefs of the parties at the time of the marriage.

It is noticeable that only one of the parties need believe in the marriage. Thus the ordinary case of a deceitful bigamy would be covered as well as a mutual mistake as to formalities, for instance—but not, of course, a deliberately shammed marriage known to both parties to be such.

There will naturally be difficulties of proof. For instance, it is left to the courts to decide on such evidence as can be put before them whether a particular act of intercourse may be said to result in a particular birth.

Section 2 is not conditional on the grant of a decree of nullity, as was the 1949 measure. Yet the definition it adopts of a void marriage is "a marriage, not being voidable only, in respect of which the High Court has or had *jurisdiction* to grant a decree of nullity, or would have had such jurisdiction if the parties were domiciled in England."

Succession and devolution

One incidental matter reinforces the distinction taken earlier in this article between statutory legitimation and "deemed" legitimacy. A person legitimated under the 1926 Act could not succeed to a dignity or title of honour, for s. 10 of that Act provided to the contrary, and the same will perforce be true of those whom s. 1 of the Legitimacy Act, 1959, brings newly within the older statute's scope. But there was no such restriction in relation to the child of a voidable marriage rendered legitimate by the Act of 1949. What is the position in this regard of the beneficiaries of the new s. 2? It might be thought that they, too, would take their "deemed" status on the same terms as persons regularly born within the range of succession to a title.

However, s. 2 (3) secures the rights of existing persons with present expectations by declaring that, so far as it affects the succession to a dignity or title of honour, s. 2 applies only to children born after the commencement of the Act. Nothing in the Act affects the Succession to the Throne (s. 6 (4)).

Proprietary rights generally are dealt with in s. 2 (4). The section is not to affect any rights under the intestacy of a person dying before 29th October next; nor (except so far as may be necessary to avoid the severance from a dignity or title of honour of property settled therewith) does it affect the operation or construction of any disposition coming into operation before the same date.

Children of void marriages, then, who fulfil the conditions of s. 2 will rank as legitimate children of their parents in determining rights under future intestacies, and in construing dispositions which come into operation in the future, i.e., on or after 29th October of this year. The only exception is that, so far as the succession to dignities and titles is concerned, it is an additonal condition that the child shall have been born after 28th October, and it is provided that this condition shall also apply as regards property settled along with a dignity or title. But the exception against severance means that if property is settled so as to devolve with a title to which a person succeeds by virtue of birth after the 28th October, then that property will stay with the title notwithstanding that, had it stood alone, the succession to it (being governed by a disposition operative before 29th October) would devolve under the old law.

The later sections: guardianship

According to the long title of the new Act, further purposes achieved by it are expressed in the phrase "and otherwise to amend the law relating to children born out of wedlock." Sections 3, 4 and 5, which effect these further amendments, have in themselves no relation to legitimacy or legitimation. Their subject-matter lies rather in the field of bastardy.

By s. 3 the provisions of guardianship law which enable a court to make custody and access orders on the application of the mother or father of an infant are extended so as to apply for the future to illegitimate infants as they now apply to those who are legitimate. The reference is to the Guardianship of Infants Act, 1886, s. 5, and s. 16 of the Administration of Justice Act, 1928. No order under these provisions for the payment of money towards the maintenance and education of an illegitimate infant may be made, however (subs. (2)), that matter being left to the existing law of affiliation.

Subsection (3) enables the natural father of an illegitimate infant to exercise, on a kind of joint and several basis with the mother, the same powers and duties of guardianship and of appointing testamentary guardians as are possessed by the parents of a legitimate infant, provided that he has the custody of the child by virtue of an order in force under s. 5 of the Guardianship of Infants Act, 1886, as extended by the new section. The appointment of a testamentary guardian by such a father, however, does not take effect unless he had custody under a s. 5 order immediately before his death.

Affiliation proceedings

Two significant changes are introduced under this head. Hitherto it has been necessary, in accordance with a long line of cases, for the applicant's essential qualifying status as a single woman to exist at the date of her application. For the future, provided that she was a single woman when the child was born, a mother may apply under the Affiliation Proceedings Act, 1957, although she has married or has otherwise ceased to fulfil the rather special judicial definition of the term "single woman" between the birth of the child and the date of the application (s. 4).

The final substantive section of the new Act (s. 5) threatened at one time to prove as controversial as s. 1. But it has passed into law much in its original form. By it, the relaxation of normal publicity and other specialities enacted in ss. 56 to 62 of the Magistrates' Courts Act, 1952, in the case of "domestic proceedings" will in future affect also the procedure in the three related types of affiliation applications, namely, those brought on the complaint of the mother, proceedings on the application of the National Assistance Board under s. 44 of the National Assistance Act, 1948, and those under s. 26 of the Children Act, 1948, brought by a local authority. This enlargement of the meaning of the term "domestic proceedings" will not embrace proceedings for the enforcement, revival or variation of an affiliation order. These must continue to be dealt with in fully open court.

It will be apparent that these three pages of Queen's Printer's copy contain matter notable in several departments of legal practice.

J. F. J.

THE WINDING UP OF COMPANIES—IV

In the third article of this series we began to examine certain rules which result in the assets in the liquidator's hands being augmented by his being given power to recover property and money which the company itself could not have claimed. This article will be wholly concerned with the remaining rules of this category.

Fraudulent preferences

If, within six months before it commences to be wound up, a company which is unable to pay its debts as they fall due makes a payment, or transfers or charges any of its property, or takes or suffers any judicial proceedings with a view to giving a preference to any of its creditors or to a surety for any of its debts, the payment, transfer, charge or judicial proceedings will be void against the liquidator (Companies Act, 1948, s. 320, incorporating Bankruptcy Act, 1914, s. 44).

For a transaction to be a fraudulent preference, it must be entered into voluntarily by the company, the company must have the intention of giving the creditor or surety preferential treatment, and the transaction must result in the creditor or surety obtaining an improper advantage. Thus, if a company pays a claim to avoid an action being brought against it, or to prevent execution being levied on its property, the payment is not a fraudulent preference if the claimant's threat to sue or levy execution is genuine, and is not merely a façade intended to hide an arrangement entered into voluntarily by the company. Furthermore, even though a creditor puts no pressure on the company, if the directors pay his debt in the ordinary course of carrying on the company's business, there will be no fraudulent preference. The court has shown itself reluctant to infer a motive to give a preference from equivocal facts, and if the transaction is susceptible of an innocent explanation, the burden of showing that a preference was intended will be a heavy one. Thus, where an insolvent company withdrew its opposition to an application to the court by a debenture-holder for leave to register his debenture out of time and the court gave him leave to register, the court held that, although the directors' conduct could amount to a fraudulent preference, the liquidator had not positively proved that their motive was to give the debenture-holder a preference and not merely to remedy the company's oversight in not registering the debenture, and so the registration of the debenture could not be upset (*Peat* v. *Gresham Trust, Ltd.* [1934] A.C. 252).

If a transaction is set aside as a fraudulent preference, the creditor who has been preferred must repay or restore to the liquidator any money or benefit he has obtained. This is so even though the company's motive was to relieve a surety from liability for the debt and not to prefer the creditor, and in that situation the liquidator may also recover the value of the benefit given to the creditor from the surety (*Re G. Stanley & Co.* [1925] Ch. 148). If a creditor is compelled to make restoration, his rights against any surety for the debt revive, and may be enforced by the creditor applying to the court in the winding-up proceedings (s. 321). If the surety was not personally liable in respect of the debt, but had merely mortgaged his own property to secure it, however, the mortgage will have been discharged when the debt was paid to the creditor, and it will not revive when the creditor is compelled to make restoration to the liquidator. But in that case the creditor may recover from the surety as a personal liability the lesser of the debt and the value of the mortgaged property, and the creditor may apply to the court in the winding-up proceedings to enforce this liability (s. 321).

Uncompleted executions

It was shown in the second article of this series that in a compulsory winding up any execution or distress begun after the commencement of the winding up is void (s. 228), and that the court may similarly upset any execution or distress begun after the commencement of a voluntary winding-up. Additionally, in both kinds of liquidations an execution begun by a judgment creditor before the commencement of the winding up will be invalid if it has not been completed by the time the winding up commences, or, in the case of a voluntary winding up, before the judgment creditor has notice of a meeting of members being called to pass a winding-up resolution (s. 325). The Act provides that an execution against the company's goods is completed by the sheriff or county court bailiff seizing and selling them, an execution against land by its seizure or the appointment of a receiver, and an execution by way of garnishee proceedings by the company's debtor paying the debt to the judgment creditor. Despite the wording of the Act, however, it would seem that, since the introduction of the new mode of execution against land by way of a charging order in place of the old writ of elegit, an execution against land is completed for present purposes when a charging order is made, and if the company subsequently commences to be wound up, the judgment creditor may still rely on the security given him by the charging order and may have the company's land sold for his benefit. If an execution is invalid under s. 325 of the Act, the judgment creditor merely loses the benefit of the execution, that is, the right he has to exact payment of his judgment debt out of the property of the company which he has taken in execution. But if the company has already paid him the whole or part of his judgment debt to induce him to refrain from commencing or continuing with his execution, he does not have to account to the liquidator for such a payment (*Re Andrew* [1937] Ch. 122). The only ground on which the liquidator may recover the payment in that case is that of fraudulent preference.

The Companies Act, 1948, s. 326, contains additional provisions which apply where a judgment creditor levies execution on the company's goods. The section lays down different rules when the judgment debt is greater than £20 from when it is £20 or less, but since most of the cases which arise in practice are where the judgment debt is more than £20, the rules applicable in that situation alone will be dealt with. In that case the sheriff or county court bailiff must retain the proceeds of the execution (after deducting his own charges) for fourteen days after the sale; likewise, if the company pays the whole or part of the judgment debt to him to avoid a sale, he must retain the sum so paid (after deducting his charges) for fourteen days. If before the expiration of the fourteen days a notice is served on the sheriff or bailiff of the presentation of a winding-up petition or the calling of a meeting of members to pass a winding-up resolution, he must continue to retain the sum in his hands until the outcome of the petition or meeting is known. If a winding-up order is made or a winding-up resolution is passed, he will account for the sum in his hands to the liquidator; if no order is made or resolution passed, he will account for it to the judgment creditor. But for the sheriff or bailiff to be accountable to the liquidator, a winding-up order must be made on the petition mentioned in the notice served on him, or a winding-up resolution must be passed at the meeting mentioned in the notice. Consequently, if notice of a meeting to pass a winding-up resolution is served on the sheriff or bailiff, but a winding-up petition is presented before the meeting is due to be held, he must account to the judgment creditor when the meeting fails to pass the resolution, and may not retain the proceeds of the execution to await the outcome of the petition (*Bluston & Bramley, Ltd.* v. *Leigh* [1950] 2 K.B. 548). Moreover, in that situation the judgment creditor would not be accountable to the liquidator for the money paid to him by the sheriff, for the execution was completed before the winding-up petition was presented, and so s. 325 is inapplicable.

The rights of the liquidator to recover property taken in execution or money obtained in consequence of execution being issued may be set aside by the court on such terms as it thinks fit, and the court will be particularly ready to do this if the judgment creditor has delayed levying execution at the company's request (*Re Grosvenor Metal Co., Ltd.* [1950] Ch. 63), or if execution has been delayed by the company taking groundless proceedings to set the judgment aside (*Re Suidair International Airways, Ltd.* [1951] Ch. 165).

Fraudulent trading

By the Companies Act, 1948, s. 332, in any liquidation if the court is satisfied that the company's business has been carried on with intent to defraud its creditors or the creditors of another person or for any fraudulent purpose, the court may declare any persons whom it finds responsible for carrying on the company's business in that way to be personally liable for all or any of the company's debts and liabilities. Such an order can only be made against persons who have been guilty of dishonest conduct, but it is dishonest for directors to continue to carry on the company's business and to incur further debts when they know that it cannot pay its existing debts, and an order under s. 332 may consequently be made against them in those circumstances (*Re William C. Leitch Bros., Ltd.* [1932] 2 Ch. 71). The amount of the company's indebtedness for which the guilty directors are made liable is left to the discretion of the court, and the court will not make them liable for more than the aggregate of the debts incurred during the period of fraudulent trading. But the liquidator, and not the defrauded creditors, is the person to recover the amounts ordered to be paid by the directors, and he will merely add them to the other assets of the company, so that all creditors of the company will benefit therefrom by receiving an increased dividend, whether their debts were incurred during the period of fraudulent trading or not (*Re William C. Leitch Bros., Ltd.* (No. 2) [1933] Ch. 261).

Misfeasance proceedings

In the winding up of any company the liquidator, official receiver or any creditor or contributory may apply summarily to the court for an order that any promoter or past or present director, manager, liquidator or officer of the company who has misapplied or retained or has become liable or accountable for any money or property of the company, or who has been guilty of any misfeasance or breach of trust, shall repay or restore the money or property, or shall contribute such sum to the assets of the company as compensation as the court thinks just (Companies Act, 1948, s. 333).

The purpose of misfeasance proceedings is to recover property or damages for which the company would otherwise have to sue in an action commenced by writ, and the advantage of such proceedings is that they are initiated by summons and are tried without pleadings, so that they are speedier and cheaper than an action. The court has no jurisdiction to give relief in misfeasance proceedings where it could not do so in an action brought in the company's name, however, and so misfeasance proceedings do not properly fall into the category of cases where the liquidator may recover money or property which the company could not claim. Nevertheless, it is convenient to deal with them at this point because, like the other proceedings dealt with in this article, they do result in an increase in the assets available in the liquidator's hands to meet the company's liabilities.

The circumstances in which misfeasance proceedings may be brought are limited by two factors, namely, the status of the respondent and the nature of the claim against him. The persons who may be sued in this way are catalogued exhaustively in s. 333; no other persons may be so sued. Only the final class of these persons, "officers," is sufficiently general to have caused difficulties of interpretation. The Companies Act, 1948, s. 455, provides that a secretary is an officer, and so presumably is an assistant secretary. It has, moreover, been held that an auditor is an officer for the purpose of misfeasance proceedings, although for the purposes of other provisions of the Act he is not. A director is amenable to misfeasance proceedings even though his appointment was defective, or even though he has continued to act after he ceased to be a director. But trustees for debenture-holders, and receivers and managers appointed by debenture-holders under the provisions of their debentures or by the court on their application, are not officers of the company, nor are the company's solicitors or bankers, so that if any of these persons are to be sued for wrongs done by them, the liquidator must sue them by an action brought in the company's name.

Misfeasance proceedings are limited in respect of the type of claims for which they lie in that the only remedies which the court can give are to order the restoration of property which belongs to the company and to award compensation against persons who have been guilty of misfeasance or a breach of trust. Consequently, misfeasance proceedings cannot be used to recover a debt owed to the company by one of its officers (*Re Etic, Ltd.* [1928] 1 Ch. 861), nor to recover the nominal value of qualification shares which a director should have taken from the company in compliance with a requirement

in its articles of association (*Re Canadian Land Reclaiming and Colonising Co.*; *Coventry and Dixon's Case* (1880), 14 Ch. D. 660). Moreover, even when a director or officer has been guilty of a wrong committed against the company, misfeasance proceedings do not lie against him unless he has broken some fiduciary duty; if he has been guilty of no deliberate wrong-doing, but has merely caused the company loss by his negligence, the liquidator must sue him by an action (*Re B. Johnson & Co. (Builders), Ltd.* [1955] Ch. 634).

Creditors and contributories may bring misfeasance proceedings as well as the liquidator. But if a contributory brings them he must show that he will benefit personally if they are successful; if he cannot show any prospect of personal benefit, the court will not investigate the allegations he makes (*Re B. Johnson & Co. (Builders), Ltd.*). A contributory will have such a prospect of personal benefit only (*a*) if he is or was the holder of partly paid shares, when the amount recovered by the misfeasance proceedings will be added to the company's assets and will help to reduce the amount of unpaid capital which has to be called up from him; or (*b*) if he is the holder of fully paid shares and the company is solvent or will be made solvent by the amount recovered by the misfeasance proceedings, his interest then being the expectation of obtaining repayment of a larger part of his share capital on the distribution of the company's assets.

(To be continued) R. R. P.

Common Law Commentary

THE DUNEDIN FORMULA

WHERE an employee suffers injury at work and brings a claim for damages for negligence against his employer, a test for negligence suggested by Lord Dunedin is whether the evidence adduced shows that " the thing which the employer did not do was a thing which was commonly done by other persons in like circumstances or that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

This apothegm occurs in *Morton* v. *Wm. Dixon & Co., Ltd.* [1909] S.C. 807, 809, and has come to be known as " the Dunedin formula." It is a useful guide which has been much quoted and often approved, but recently in *Cavanagh* v. *Ulster Weaving Co., Ltd* [1959] 3 W.L.R. 262; p. 581, *ante*, the House of Lords pointed out that the test of trade practice (which is the essence of this formula) is not conclusive.

Law lords' comments

Lord Keith of Avonholm, commenting on the formula, expressed the opinion that Lord Dunedin cannot have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workman, and that Lord Dunedin was not laying down a new principle of law; he was stating the factual framework within which the law would fall to be applied, so that where an act of omission is alleged his lordship thought that, in the absence of evidence of practice, the circumstances will rarely if ever lead the judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can be readily understood and commends itself to common intelligence as something to be required.

" Folly "

It is on this second limb that discussion has generally turned, and Lord Keith said that there was no particular magic in the word " folly." " It gives the formula the characteristic that was described by Lord Normand (in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382) as 'trenchant,'" said his lordship, and went on: " Lord Dunedin might equally have said, 'It would be stupid not to provide it,' or 'that no sensible man would fail to provide it,' or 'that common sense would dictate that it should be provided.'" Lord Keith added that Lord Cooper had used "inexcusable" as the equivalent of " folly," whilst Lord Cohen had said, agreeing with Parker, L.J. (as he then was), that " folly " was not to be treated as " ridiculous."

Like anything else, there is a danger in misuse of formulæ. Lord Somervell of Harrow said: " I do not pretend to have considered every gloss on 'reasonable care' which may from time to time have been cited as helpful, but speaking for myself I think the fewer the formulas the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another."

Practice

That is what happened here: the Court of Appeal in Northern Ireland thought that this formula was the sole guide to be followed and they apparently read it as meaning that if practice in the trade was established and the defendant had complied with it then, unless there was some omission which amounted to folly, the defendant had conclusively established his defence and that the case should be withdrawn from the jury.

That is an incorrect use of the formula, which is merely a guide to help answer the overriding problem whether reasonable care was taken. Evidence of practice is useful, but Lord Somervell thought that the practice must be clearly proved and the circumstances covered by the practice must be precisely similar to those in which the accident happened. Lord Simonds did not agree on the latter point (see below). Furthermore, it would be a mistaken view to think that, where no evidence of practice is given, the plaintiff must establish folly to make out a *prima facie* case.

Roof ladder

The plaintiff's accident occurred whilst he was on a roof ladder laid on a roof sloping at about thirty-seven degrees. He was descending the ladder from a staging, carrying a bucket of cement, and this necessitated his walking upright, facing forwards. His task was to descend the ladder and then walk along a valley or gully between two roofs. As there was an accumulation of water in the gully he had been provided with a pair of rubber boots (which were two sizes too big for him). The boots were apparently wet at the time of the accident, though whether and to what extent they were a cause of the accident was not clearly established. The emphasis seems to have been placed on the absence of any handhold to assist the plaintiff from stepping from the

staging near the top of the ladder on to the ladder. It was in the course of doing this that he slipped and fell against the roof opposite him. He did not go through but was badly cut and had to have part of an arm amputated.

Usual set-up

Evidence was given to show that the system used by the employers was in accordance with usual and normal practice so that the first part of the Dunedin formula was satisfied. Was it "folly" not to provide a handhold or some other assistance to prevent this accident? The judge of first instance, having awarded damages to the plaintiff, reduced by one-tenth for the plaintiff's contributory negligence, presumably would have said that it was, though the report does not show whether he applied that formula, but the Court of Appeal considered that the judge ought to have withdrawn the case from the jury when the evidence of practice showed that the employers had adopted a set-up or method commonly employed. It was here that the Court of Appeal had erred and the House of Lords therefore restored the finding of the judge of first instance.

Viscount Simonds said that, although the evidence in regard to the set-up was of very great weight and not really challenged, it was not so conclusive as to require the learned trial judge to withdraw the case from the jury. There were other matters also which they were entitled to take into consideration, and it was for them to determine whether in all the circumstances the respondents had taken reasonable care. "But that does not mean," said the learned law lord, "that the familiar words of Lord Dunedin in *Morton* v. *Wm. Dixon, Ltd.*, which have been so often quoted both in Scottish and English cases, are not to be regarded as of great authority in determining what is in all the circumstances reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice, system or set-up, call it what you will, which has been widely used without complaint, could not rely on it as at least a *prima facie* defence to an action for negligence. . . ."

Similarity of practice

Lord Simonds added words which show that he did not fully agree with the remarks of Lord Somervell of Harrow, who had said that the practice must be clearly proved and it must be shown that the circumstances covered by the practice were precisely similar to those in which the accident happened. On this aspect, Lord Simonds said: ". . . and I would say, with the greatest respect to those who think otherwise, that it would put too great a burden on him to require him to prove that the circumstances of his own case were 'precisely' similar to those of the general practice."

Lord Dunedin's formula is an attempt to bring into sharper focus what is meant by the term "reasonable care" when applied in particular to systems of work, but of course it can be applied to any arrangement of a recurring type. It provides two useful questions which one should address to oneself in trying to decide what is reasonable. The test in effect is: (i) What do others usually do in similar circumstances? (ii) Was there here an imprudent failure to do something? But behind it all the basic duty is to apply one's mind to the general question of reasonable care. The thought process is essentially a process of asking oneself questions about the subject-matter of the thought, but it would be a mistake to suppose that one or two questions of a standard pattern are always enough to solve a particular problem. L. W. M.

LOST WEEK-ENDS—AND NIGHTS

[From "Crime Doctor" by Dr. A. David Matthews, published by John Long Limited at 18s. net.]

In the course of a year every police surgeon has more than a fair share of calls to drunks who require attention. In their worst state they can be extremely tricky propositions and the wise practitioner is always alert to the dangers of attack, when making his examination.

After leaving Shoreditch, I soon received my official appointment as the resident divisional police surgeon in part of North London and experience of drink cases was not long delayed.

I recall the time when an inebriate, shouting hysterically, chased me round the charge room of a police station before help arrived to restrain him. Another, in allegedly jocular fashion, borrowed my fountain pen to sign his name on the charge sheet and put an end to it by flattening the nib against the wall.

Several allied servicemen I had cause to examine during the Second World War proved extremely truculent. There was, for instance, the drunken American negro who, much to the amazement of his police captors, flooded out his cell by tearing the radiator away from the wall. And the reeling, staggering Pole, who clutched me round the neck and insisted that we should go down the road together "for one final drink" before I ran the rule over him. Though quite incapable of walking properly, he looked most hurt when I refused his offer of hospitality.

One prisoner snatched a policeman's helmet and tried to "drop" a goal with it, while another attempted to prove his sobriety by standing on his head—with, I might add, alarming results! There was also the individual who burst into a frenzied dance and tried to get me to join in, as well as the old hand who brought several bottles of beer into the station with him. During my examination he picked one up, held it to eye level and said solemnly: "To me, this is forever amber."

A word to you about alcohol. Most people believe that the hardened drinker can absorb more of it than the inexperienced one, without developing signs of drunkenness.

This is by no means correct. Alcohol, once ingested, passes into the bloodstream and, by means of tests, a medical scientist can establish the percentage which has been consumed. All heavy drinkers eventually develop chronic gastritis. Their stomach linings are unable to absorb liquor as speedily as is the case with a healthy person.

Thus, an equal quantity of alcohol consumed by both the toper and the occasional drinker may produce, at the end of an hour, a blood alcohol of ·05 per cent. in the former and the much more serious amount of ·15 in the latter.

In Scandinavian countries the police place great reliance on the result of a blood test and in most places one is taken in every driving case. If the percentage of alcohol exceeds ·1 per cent., the motorist is automatically convicted.

Given the test of a large and equal quantity of alcohol over a set period, the inexperienced drinker soon shows signs

that he is well under the influence, while the " complete imbiber " displays little signs of insobriety. He does not escape, however. He becomes drunk later, when his less healthy system has had more time to absorb the alcohol. On the other hand, the experience is such a usual one for him that he can usually cover it up far better than the novice.

As a young doctor, in common with many others, I was rather ignorant on the subject and when called as a defence witness by a patient who had been charged with driving while under the influence, I revealed my lack of knowledge all too quickly.

In the witness box I burbled on to the effect that my patient was an admitted heavy drinker, but that I knew he could consume an amazingly large quantity of liquor before it put him under the influence. The learned magistrate of this particular North London court was an experienced man and he looked at me with a mixture of pity and benevolence.

" I think you've said all that is necessary," he murmured —and proceeded to convict my patient.

Red-faced, I made a hasty withdrawal. It taught me a lesson, however. Without delay I began a full study of the subject, determined never again to be caught out. The knowledge I acquired stood me in good stead when later I took over as a police surgeon and had to cope with all types of drink cases as part of my ordinary routine.

As I have pointed out, a good deal of the police surgeon's regular work is concerned with drunkenness in its various forms and aspects. With monotonous regularity he is called in to certify the ordinary drunk, picked up off the public highway, or a person who is so much under the influence of alcohol or drugs as to be incapable of having proper control of a motor vehicle. While the former is not regarded as a serious offender—a usual fine being between ten shillings and two pounds—the latter charge, if proved, may involve a fine of up to £100, with or without imprisonment, and suspension from driving for a long time. There can even be life suspension in bad cases.

" Let's have one for the road " is an epitaph which has been spoken by many who will never drive again—either because they are dead or badly crippled. The final drink is so often just that one too many and by far the most dangerous for the man who has his car parked outside the public house, or the venue of the party.

His judgment and reactions impaired, his journey home can so easily finish in the destruction of both himself and innocent passers-by. Too often it ends in a police station, with the ominous words of the accusation in his ears: " That you were in charge of a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control . . ."

The police surgeon is called in to decide, by means of a detailed examination and tests, whether or not a detained motorist is, in fact, in a condition which precludes him from driving properly. Cases in the courts featuring well-known people have caused much discussion and speculation about these expert tests. There have even been television programmes about them. One doctor in the Midlands, when questioned in court, was himself unable to perform two of the tasks he had set the man in the dock!

Many drivers ask me how a police surgeon's tests are applied, if they are completely fair to the motorist and if they can be relied upon in establishing proof beyond reasonable doubt.

Well, I can say that in my years as a Metropolitan police surgeon, I myself have used tests on more than a thousand drivers. My considered opinion is that they are perfectly just and—so long as the doctor's final decision is based on the results of his examination as a *whole* and not just individual features of it—they provide as accurate a conclusion as is medically possible.

A few years ago a special sub-committee appointed by the British Medical Association surveyed the whole subject. Sitting on it were representatives of the Magistrates' Association and the professional associations of the Chief Constables and police surgeons.

The tests to-day are based within the general framework of their recommendations, but a police surgeon is free to formulate his own, so long as they conform to the general pattern.

As an illustration, come with me on a typical " drink test " case. It is to be held in the charge room of a suburban police station, late at night (that is almost always the time!). The charge room is austerely furnished—a plain table, a desk and one or two wooden chairs. The walls have been distempered in an unattractive green.

Awaiting my arrival are the disconsolate motorist who has been picked up, the station officer and the arresting policeman, usually a patrol-car man. He often remains for my examination, but will withdraw if the detained driver particularly requests him to. It is only right to point out that this officer has no say whatever in the proceedings.

Before I begin I have to obtain the motorist's consent. He is entitled to refuse and to insist on an examination by his own doctor. He cannot, however, prevent my remaining to observe him, if someone else does perform it. Or, if his refusal is a complete one, of forming my own opinion as to his state of sobriety.

There is nothing of the inquisition about such an interview, as so many mistakenly imagine. The motorist is not allowed to smoke until I have finished with him, but there are no glaring arc lights, threats or bullying questions. Indeed, he can sit comfortably, except when carrying out the walking and bending tests.

For my own part, I make it a practice to caution him at the start to the effect that if my findings go against him, anything he has said or done during the examination may be used as evidence in court.

I ask him if he is in good health, or under treatment by a doctor. As I begin, I put down the time and from then onwards write it again at various stages of the examination.

The physical check comes first. I note his breath, the state of his tongue, his temperature, his pulse rate and whether or not his face is flushed.

I look closely into his eyes to see if the whites have become bloodshot and to what extent the pupils are dilated. His general demeanour is an important factor, as is his speech. But he will not be asked to repeat tongue-twisters, which many people are unable to cope with successfully, anyway. I am all against the introduction of trickery and catch questions into these tests.

Instead, I ask him to read from a printed form and I follow his performance on a duplicate copy. Early in the interview he will have been requested to write his name and address legibly on the lines of a piece of foolscap paper—and he will be asked to do the same thing again at the end of the examination. The difference in the handwriting is sometimes considerable if he has managed to sober up during the tests.

I always give my " suspect " motorists the Romberg test. This is the one for diagnosing balance and nervous co-ordination ability, devised by Dr. M. H. Romberg, a German physician and neurologist. The man is told to stand with

his heels together, his arms at his sides and his eyes shut. This immediately reveals his co-ordination, or lack of it. The next instruction will be for him to put out his hand and touch the end of his nose with the tip of his index finger; first with his eyes open and then with them closed.

By the way, he is not asked to walk along a chalk line, as is the popular belief. Instead, I tell him to walk from one side of the charge room to an indicated spot on the other. At a stage of this journey he is asked to turn and come back to me at once. He will also be asked to pick up several articles, like a pencil and a key ring, from the floor—without toppling over in the process!

The last of these co-ordination tests—and it is the most difficult of them all—is the one where the driver is asked to walk heel to toe. If he is really under the weather, he will be quite unable to do this. But I wish to emphasise that he is not judged solely on his failure in any one, or even several, of these tests. My final decision will be based on the results and examination as a whole.

The controversial arithmetical test consists of two simple oral questions and one written one.

"Add seven plus five plus three," I might say. Or another question might well be: "What change from a pound would you get if you bought a three-and-eleven-penny packet of cigarettes?" They are never more difficult than that, though admittedly, I know one or two very intelligent people who, in a state of complete sobriety, would be unable to answer them briskly! Some people, well above the average "I.Q.", possess a blank spot when it comes to mental arithmetic.

I usually write down two six-figure numbers and ask my detained driver to subtract, on paper, the second from the first. The time taken over this poser is also a useful indication as to his state.

At some point during my examination, I will have asked the man how much he has had to drink; also if he knows where he is and how he has spent his time during the past hour or so. I recall the case of a man brought in at 5 a.m. who waxed indignant because he thought he was being made late for an appointment at seven-thirty the previous evening. He had "lost" one complete night of his life, a not uncommon experience for the heavy drinker.

The whole of my interview in the charge room will probably have lasted three-quarters of an hour. As soon as I have finished, the driver is allowed to smoke if he so desires and is given a cup of tea. If I decide in his favour, he is driven back to his car by police patrolmen and allowed to go on his way. If not, he is detained and charged.

Blood tests are not taken in this country unless the motorist requests them. In such an eventuality, the blood is placed in three tubes which are sealed and signed in his presence. One is for his doctor; the other two go to Scotland Yard for laboratory analysis. Normally, however, they are avoided as they can give a wrong picture of a man's state—as I have explained in contrasting heavy drinkers with comparative teetotallers.

Frequently I have heard the opinion expressed that police surgeons as a whole are very biased against motorists. That is not so. All of those that I know are, like myself, doctors in general practice with no axe to grind and are themselves drivers. I treat the drivers I examine in the same way as any doctor does in dealing with a sick patient. I receive my attendance fee, whether I certify them or not and my verdict by no means always favours the police. It is a matter of satisfaction to me personally that there has not been a single case where the police questioned my decision after I had decided in the motorist's favour.

In the many police stations of the Metropolitan area, no charge is preferred unless the motorist has been certified by the divisional police surgeon. This ruling does not apply to many of the other Constabularies and a person may find himself charged without the benefit of a medical examination. Medical circles are strongly against such a procedure, however, since alcohol may mask the presence of genuine illness.

The Act as it stands also applies to driving under the influence of drugs. This particular section is only rarely invoked, but I have encountered cases. Insulin, the life-saving substance injected by diabetics, may, if not followed by a suitable meal, lead to the development of symptoms very similar to severe intoxication. But it is only when the diabetic motorist uses his drug carelessly that he renders himself liable to prosecution.

The police are not always doing the suspected driver a disservice by bringing him in. In my own experience I know of four lives which have been saved in this way. One suspected drunk, when I examined him, was found to have a brain haemorrhage. Three others were in diabetic comas and, but for quick diagnosis and treatment, would assuredly have died.

Many motorists guilty of excessive drinking tend to return to the scene of their conviction. One of my best "customers" was certified at our first encounter and duly suspended. Some while later I was called to the same station and renewed his acquaintance, but on that occasion I would not certify him because of his "bordering" condition. Three years later, however, he was convicted and fined for a similar offence in the West End and within a year was again hauled up in my area. This time I had no alternative but to decide against him and, with his third conviction, imprisonment turned out to be his lot. These cases are upsetting, particularly where they terminate in a prison sentence. The culprits are usually a long way removed from the ordinary criminal types who frequent our jails and this man I have mentioned was a charming, cultured Irishman, who, out of his cups, was considered the soul of generosity and kindness.

Another man I certified was convicted when he appeared in court and the magistrates suspended him from driving. Fortunately his wife was also a motorist, so they were able to keep the car on the road. His term of licence suspension had only just expired, however, when I was asked by the police to examine his wife, and as a result, she too was banned from the roads for a while.

What is my advice to drivers who are not teetotallers? I am a driver myself. If I have my car with me, I limit myself to three drinks. Otherwise I see to it that I am driven home.

The chief danger, unfortunately, is the feeling of confidence and skill which even a moderate amount of alcohol fosters. The wise and strong-willed motorist is the one who can recognise the symptoms himself and arrange for someone to take him home. But far too many lack this wisdom. For them there can be but one piece of advice: if you are likely to be involved in a "session," leave the car at home. Otherwise I might find you in the charge room one of these days. And even if I decide in your favour, you will not get away without a nasty fright and a very pointed lecture on your foolishness.

There are times, of course, when a police surgeon finds himself on the opposite side of the fence in a drink case, either advancing a professional opinion for the defence, or

appearing in court to give evidence for it. I was retained by the legal advisers of a famous film and stage comedian in the early part of 1958 and I am glad to say that he was finally acquitted.

Some of the characters over whom I have had to run the rule were very pleasant indeed. One amiable little man I encountered had obviously been drinking, but did not, I felt, warrant certification because he came through my tests fairly well.

I told the police to let him go and then learned that he was a jockey—a well-known one, too. Just as he was leaving he fished a scrap of paper out of his waistcoat pocket, handed it to me with a smile and said : " Thank you for your fairness. This might be of some use to you." He had scribbled a horse's name on the paper and later I found that it was running in the three o'clock race the next day.

I am not a betting man. When I told my wife I proposed to have a small wager each way, she chided me for my meanness.

" He was obviously grateful to you and he wouldn't have troubled to give you a tip, unless it had a very good chance," she reasoned.

So after some discussion my natural reticence in gambling matters was overcome and we finally invested £10 each way. The following morning the horse was practically unquoted in the papers, but it was backed down on the course to a starting price of 3—1 and romped home, well clear of its rivals. We collected our handsome winnings and raised our glasses to the jockey that evening . . .

I have never encountered him since, but his name appears with regularity in the " probables and jockeys " lists. When I was unable to certify him he thanked me with gratitude. I now return the compliment, should he chance to read this book.

A word of warning to the unwary, where drunks are concerned. Do not be too keen to render them a good turn. Some years ago an old medical friend of mine was taking a quiet evening stroll before retiring, when in a shop doorway he chanced upon the semi-conscious figure of a man in dress clothes.

My friend recognised him as a well-known public figure locally and an acquaintance of many years' standing. He had obviously been celebrating too well.

Before a policeman could come along and intervene, he hailed a taxi-cab and took the man home. He rang the front-door bell, supporting the inarticulate, swaying figure.

When the man's wife answered, he half carried her husband inside, but, alas, was subjected to a torrent of abuse from her. How dare he make her husband drunk and then have the impudence to bring him home ? She ranted on, refusing to listen to his explanations. So he fled—a very disillusioned benefactor.

There seems a moral in this story. Perhaps it is that when confronted with a similar situation, by all means see your friend safely home. Only remember to run, once you have deposited him on the door-step and rung the bell !

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A STRANGE CASE IN BANKRUPTCY

Under the Bankruptcy Act, 1914, s. 1 (1), a debtor commits an act of bankruptcy " (*g*) if a creditor has obtained a final judgment or final order against him for any amount, and . . . has served on him . . . a bankruptcy notice under this Act, and he does not . . . either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained."

Rule 137 of the Bankruptcy Rules, 1952, provides that every bankruptcy notice shall be endorsed with an intimation to the debtor that if he has a counter-claim, set-off or cross demand, etc. (such as is referred to in s. 1 (1) (*g*) of the Act), he must within the time specified in the notice file an affidavit to that effect with the registrar. Rule 139 then states that the filing of the affidavit referred to in r. 137 shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall, " if he is satisfied that sufficient cause is shown," fix a time and place for hearing the application, etc.

The words " if he is satisfied that sufficient cause is shown " were inserted in the regulations of 1952 to reinforce previous decisions to the effect that if the affidavit does not show on the face of it that the counter-claim, etc., equals or exceeds the judgment debt the rule does not come into operation (*Re a Debtor* (No. 523 of 1934) [1935] 1 Ch. 347), so that a debtor must generally quantify his counter-claim and give full particulars. In that case the judgment debt was £2,727, while the cross demand was for two sums aggregating only £1,500. It was held that the case must be treated as if no affidavit under r. 140 of the regulations of 1915 had in fact been filed.

In *Re a Debtor* (No. 80 of 1957) ; *ex parte The Debtor* v. *Wiseburgh* [1957] 3 W.L.R. 184, however, the judgment debt was £636 and the cross demand a claim in proceedings under s. 17 of the Married Women's Property Act, 1882, to household chattels valued by the debtor at £20,000 and by his wife, the judgment creditor, at £6,000. It was held that the claim was a genuine demand which had a reasonable probability of succeeding to an extent necessary to equal or exceed the judgment debt, and that it was a cross demand within s. 1 (1) (*g*) of the Bankruptcy Act, 1914 (see also *Re a Bankruptcy Notice* (No. 171 of 1934) [1934] 1 Ch. 431, and *Re a Debtor* (No. 66 of 1955) ; *ex parte The Debtor* v. *Trustee of the Property of Waite* (*a bankrupt*) [1956] 1 W.L.R. 1226). To obtain an adjournment of the application the debtor must show on affidavit some good ground for setting aside the notice (*Re Cole ; ex parte Attenborough* [1898] 1 Q.B. 290).

Facts of case under review

In 1948 *B*, who was in business as a photographic and film processor, agreed to purchase from *X* company large quantities of paper for backing films and paid the company about £1,000 in advance of deliveries. The paper purchased was delivered to processors for further treatment, but was eventually sold by *B* to his customers. On 17th November, 1948, a balance of some £354 was due to the company in respect of paper delivered and the company issued a specially endorsed writ claiming that amount. On 20th December, 1948, *B* delivered a defence and on 24th November, 1949,

an amended defence and counter-claim. By the counter-claim he claimed £6,000 damages from the company on the ground that the paper was unsatisfactorily treated by the company and was thereby rendered commercially worthless. At the same time actions were pending against *B* on account of the nature of the paper delivered to his customers and third party proceedings against *X* company were envisaged.

On 8th March, 1950, the case came on for trial before Oliver, J., at Manchester Assizes. Immediately prior to the hearing *B* was advised by his leading counsel that application should be made for the counter-claim to be withdrawn on the ground that the full extent of the subject-matter of the counter-claim and third party claims could not then be ascertained and that there was a technical error in the pleadings delivered on behalf of *B*. By consent the counter-claim was withdrawn without prejudice to the bringing of a fresh action. Judgment was then given for the company in respect of its claim for £354 for the reason that, as the judge found, in respect of the items constituting that claim, there had previously been an oral agreement of accord and satisfaction between the parties. The judgment, however, was not satisfied and on 11th April, 1950, the company caused a bankruptcy notice to be served on *B*. On 13th April, 1950, *B* issued a writ against the company claiming damages for breach of contract and breach of warranty in connection with the paper supplied by it, which the statement of claim delivered on 30th June, 1950, quantified in the sum of £9,233.

Move to set aside bankruptcy notice

Meanwhile, however, *B* had taken action under r. 141 of the Bankruptcy Rules, 1915 (now r. 139 of the Bankruptcy Rules, 1952), but the registrar refused to set aside the notice on the ground that the "debtor has not satisfied me either (*a*) that his claim for damages either equals or exceeds their (the company's) debt, or (*b*) that he has a counter-claim that he could not have set up in the action; in fact he did set it up and withdrew it on counsel's advice." The registrar relied on *Re a Debtor* (No. 523 of 1934) [1935] 1 Ch. 347 and *Re a Bankruptcy Notice* (No. 171 of 1934) [1934] 1 Ch. 431. Later, the registrar stayed proceedings on the receiving order pending determination of *B's* action against the company. The company appealed against this order to the Divisional Court sitting in Bankruptcy under s. 108 (2) of the Bankruptcy Act, 1914, and the court allowed the appeal but stayed the bankruptcy proceedings on *B's* undertaking to prosecute the action against the company and ordered the sum of £300 to be paid to a stakeholder by 3rd October, 1950. This money was not paid and on 26th October, 1950, a receiving order was made against *B's* estate. On 22nd November, 1950, *B* was adjudicated bankrupt.

The position with regard to the estate was that, apart from *B's* claim against the company for £9,233 and sundry small book debts of about £27, amounting in the aggregate to about £9,260, there were assets of about £274 as against contingent liabilities of about £3,340 (which were later considerably reduced). If, however, *B's* claim against the company succeeded and some £9,000 was recovered, it would enure as to £3,340 for the benefit of the creditors and as to about £6,000 for the benefit of *B*.

Legal aid certificate—trustee in bankruptcy

Before the receiving order was made *B* had applied for a legal aid certificate to prosecute his action against the company and on 24th November, 1950, a certificate was granted. After being adjudicated bankrupt, *B*, on the suggestion of the secretary of the legal aid committee, applied for the certificate to be discharged, and on 18th December, 1950, it was discharged. *B's* creditors being unwilling to give an indemnity against costs in the event of the trustee in bankruptcy continuing the action against the company, the trustee on 18th December, 1950, himself applied for a legal aid certificate, which was refused on the ground that it "appears unreasonable that you should receive legal aid in the particular circumstances of the case." The trustee appealed to the area committee and on 22nd March, 1951, a certificate was obtained. Notice of the obtaining of this certificate having been given to the company, as is necessary, the company applied for an order of certiorari to quash the certificate on the ground that the committee had exceeded its jurisdiction. The proceedings arising out of the application are reported in *R.* v. *Manchester Legal Aid Committee; ex parte R. A. Brand & Co., Ltd.* [1952] 2 Q.B. 413.

The court held (i) that the committee had exceeded its jurisdiction since it was a condition precedent to the grant of a certificate that there should have been a determination by the National Assistance Board of the disposable income and capital of the person applying for the certificate, and no determination had been made in regard to the trustee's disposable income or capital but only in regard to that of the bankrupt; (ii) that the committee were amenable to certiorari since they were a body of persons having legal authority to determine questions affecting the rights of subjects and had a duty to act judicially, and (iii) that the applicants, as persons who had incurred the risks inherent in having to defend an action brought by a person who had been granted legal aid, were "aggrieved persons" and, therefore, an order for certiorari would be granted. (The trustee in bankruptcy had also obtained a legal aid certificate to oppose the motion for certiorari.)

Despite the loss of the legal aid certificate the action against the company was continued, and in 1952 was settled by the payment to the trustee in bankruptcy of £1,500, so that at all material times *B* was, in fact, a creditor of the company rather than a debtor to it.

Subsequent steps

Following the settlement of the action *B* applied under s. 29 (1) of the 1914 Act for an order annulling his adjudication as bankrupt, but this was refused on the ground that *B* had not paid his debts in full—Board of Trade charges and costs having apparently absorbed £1,300 out of the £1,500 recovered. *B* then applied under s. 108 (1) of the Act of 1914 to the Divisional Court sitting in Bankruptcy to review the order of the court made on 31st July, 1950, staying the bankruptcy proceedings against him on terms (which he did not fulfil since he failed to pay £300 to a stakeholder by 3rd October, 1950). Again *B* was unsuccessful but notes of the case show Harman, J., as having said this: "It appears that there should never have been a receiving order in the first place—that is quite clear, clear when the judgment creditor owed the debtor more than he owed them. These people apparently knew at the time the position between them and him. In the circumstances no one ought to be made bankrupt by his creditors. The upshot was that you (addressing leading counsel for the company) paid him or his representatives £1,500, foregoing your judgment debt and withdrawing your proof . . . You made a man bankrupt for £300 when he had a claim against you for £9,000." The date of this hearing was 28th November, 1955.

B then appealed to the Court of Appeal under s. 108 (2) of the Act and was unsuccessful once more, but was there told that " as things went wrong at the bankruptcy notice stage (he) should rightly find a way to do something at this point." Acting on this suggestion, he appealed to the Divisional Court against the order of the registrar made in April, 1950, refusing to set aside the bankruptcy notice. This appeal was heard on 20th April, 1959, and is referred to in the *Manchester Guardian* for the day following. Giving the judgment of the court, Danckwerts, J., said that at first sight it seemed anomalous that a person who in the result turned out to be the debtor should have been enabled to make his creditor bankrupt, but when a bankruptcy notice was presented a judgment debtor was only entitled to resist if it he could show that there was a counter-claim which he could not have pursued in the action in which the judgment was obtained. *B* had failed to persuade the registrar that his counter-claim could not have been raised in the action (*cf.* counsel's advice), and, when all the facts were before the Divisional Court in 1955, they had refused to interfere. Two judges also expressed the view that the application was wrongly made and that the matter was one for annulment. But it seems that the annulment proceedings referred to, *supra*, also went to appeal and were unsuccessful for the reason that, where the proceedings under the 1914 Act, s. 29, are founded on a judgment, the bankrupt cannot bring an action to set it aside on any ground while the adjudication stands.

Rescission and annulment

Under s. 108 (1) of the 1914 Act, every court having jurisdiction in bankruptcy under the Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction, but the jurisdiction is to be sparingly exercised (*Re a Debtor* [1936–37] B. & C.R. 187). The power to rescind is discretionary (*Re Leslie ; ex parte Leslie* (1887), 18 Q.B.D. 619) but where the court below has exercised its discretion, it will require a very strong case to authorise or induce the Court of Appeal to interfere (*Re Davidson ; ex parte Davidson* [1894] W.N. 210). In *Re Hester ; ex parte Hester* (1889), 22 Q.B.D. 632 it was held that a receiving order could only be rescinded on the same grounds as an adjudication could under (now) s. 29 of the 1914 Act be annulled, *viz.*, where the debts are paid in full or where the order ought never to have been made. But in *Re Izod ; ex parte Official Receiver* [1898] 1 Q.B. 241 it was held by a majority that the discretion to rescind a receiving order came within (now) s. 108 and was not so limited, so that the receiving order was rescinded although neither of those conditions was fulfilled.

The jurisdiction to annul is also discretionary and it would not, in the absence of special circumstances, be a good exercise of the discretion to make an order of annulment when, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted (*Re Keet ; ex parte Official Receiver* [1905] 2 K.B. 666).

It may well be, therefore, that, unfortunate though *B's* experiences of litigation have been, there has been no actual miscarriage of justice. At the same time one cannot help feeling that, in his case, s. 1 (1) (*g*) has proved insufficient to prevent the very happening which it was enacted to avoid, and that so tireless a fighter deserves a better fate, especially as his bankruptcy has been brought about through no fault of his own. Indeed, in the absence of amending legislation, there can be no certainty that a mishap of this kind will never occur again.

K. B. E.

Landlord and Tenant Notebook

BUSINESS PREMISES BOUGHT OVER TENANT'S HEAD

THE metaphor used in the title was adopted by Scott, L.J., in *Epps* v. *Rothnie* [1945] K.B. 562 (C.A.) when describing the nature of the protection conferred on a rent-controlled tenant whose new landlord reasonably requires the dwelling-house as a residence for himself or his family. The decision was one of many on the meaning of " has become landlord by purchasing the dwelling-house or any interest therein " in the Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I, para. (*h*), and the learned lord justice was emphasising that the word " purchasing " was to be interpreted in its popular sense. Later, Denning, L.J., said in *Littlechild* v. *Holt* [1950] 1 K.B. 1 (C.A.) that the expression applied to the acquisition of the reversion, whether it be a freehold or a leasehold, for money or for money's worth.

Part II of the Landlord and Tenant Act, 1954, after providing that a landlord may oppose an application for a new tenancy on the ground that on the termination of the current tenancy he intends to occupy the holding for the purposes of a business to be carried on by him therein, denies that right " if the interest of the landlord . . . was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . ." (s. 30 (1) (*g*) and (2)). The case of *Frederick Lawrence, Ltd.* v. *Freeman, Hardy & Willis, Ltd.* [1959] 3 W.L.R. 275 (C.A.) ; p. 694, *ante*, gave rise to argument on (*a*) what was meant by " purchased " ; (*b*) when was an interest purchased ; and (*c*) what was the date of the termination of a current tenancy.

The transactions

On 30th June, 1954, the landlords in the case entered into a contract with the tenants' then landlords which recited that the latter had agreed to sell and the former to purchase " the goodwill and certain assets used by " the latter in connection with the latter's business, " and certain freehold and leasehold premises and interests in certain other premises short particulars of which are set out in Sched. I and Sched. II hereto (such properties hereinafter sometimes collectively called ' the said properties ') on the terms and conditions hereinafter set forth." Among the properties set out in Sched. II were leasehold buildings parts of which were then let to the tenants. By cl. 1 of this agreement the old landlords sold and the new landlords purchased " as at 1st January, 1954 (hereinafter called " the sale date "), *inter alia*, the leaseholds in question. Then by cl. 2, " the consideration for the sale and purchase hereby agreed shall be in respect of the properties first to eighthly in cl. 1 hereof the amounts respectively attributable to such properties in such order as follows." By cl. 12 (*a*) the vendors were to hold and retain possession, in trust for the purchasers, until a necessary licence to assign was obtained. No " amount " was made attributable to the

leasehold interests in Sched. II. The consideration was covenants by the tenants to pay the rent and observe the covenants and conditions of the (under) lease and a covenant for indemnity.

The transfer of the unexpired residue of the term of the leaseholds (the land being registered land) was effected on 1st November and registered on 13th November, 1954.

The new landlords served the tenants, on 28th March, 1958, with a notice to terminate the (under)lease on 22nd March, 1959, which was the date when it would (apart from the Act) expire, and stated in the notice that they would oppose an application on the ground of intention to occupy for the purposes of their business. The tenants applied for a new tenancy on 18th July, 1958. The landlords were clearly able to establish their intention, but the tenants invoked s. 30 (2).

"Purchased"

The first question, then, was whether the interest of the landlord had been "purchased" at all. (At first instance, Roxburgh, J., had held that it had been "created" within the period, but on the hearing of the appeal counsel intimated that he would rely rather on an allegation that it had been "purchased" after the beginning of the five years, etc.)

In *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham and Sons, Ltd.* [1957] 1 Q.B. 159 (C.A.), Denning L.J., had declared that in Pt. II of the Landlord and Tenant Act, 1954, "purchased" had the same meaning as in the Rent Restrictions Acts: its popular meaning of buying for money. This enabled counsel for the landlords to urge that the landlords were not "buying the business and paying for it, but were merely taking over the relevant leasehold interests."

But, looking at the recital referred to above, Romer, L.J., considered that the transaction was one of sale and purchase and nothing else; it might be difficult to say how much the new landlords had paid the old ones for the leaseholds, but the answer to the question "Did they buy the leaseholds along with the business and other assets" must surely be "yes." This, Romer, L.J., said, would be the ordinary commercial view.

There are, of course, occasions when a term has no value or has a negative value; the burden may equal or outweigh the benefit and one can imagine a sale of assets with a tenancy "thrown in." But this would hardly be one of them.

When

There were three possible dates: 30th June, when the above-mentioned agreement was signed; 1st November, when the transfer was executed; 13th November, when it was registered. This led to a subtle but important distinction being drawn between purchasing an interest and becoming a landlord. What mattered, Romer, L.J., pointed out, was the interest by virtue of which the landlord opposed the tenant's application; this had been acquired by the agreement of 30th June, though the Land Registration Act, 1925, did not give the purchasers the status of landlords till 1st November —or perhaps more strictly, 13th November.

The judgment cited *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, as illustrating the well known equitable principle that a purchaser is treated as owner, and the Rent Acts case of *Emberson* v. *Robinson* [1953] 2 All E.R. 755 (C.A.), in which a landlord who had signed the contract in June, 1939, but (owing to the outbreak of World War II, in which he served) did not complete till 1945, was held to have become landlord by purchasing in June, 1939 (the action was for possession against a tenant to whom the vendors had let the house in November, 1939).

Termination of current tenancy

This point gave rise to far more difficulty than the others. It was true that the date specified in the landlord's notice to terminate synchronised with the date of the expiry of the term granted. But what about the "interim continuance" provisions? Section 64 (1) of the Landlord and Tenant Act, 1954, provides "in any case where (*a*) a notice to terminate a tenancy has been given . . . or a request for a new tenancy . . . and apart from this section the effect of the notice . . . would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice . . . shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time."

It was not mentioned that some recent litigation has shown how far-reaching the effect of this provision can be. In *Espresso Coffee Machine Co., Ltd.* v. *Guardian Assurance Co., Ltd.* [1958] 1 W.L.R. 900, counsel for the tenants announced his intention to exploit it ("not a very admirable attitude," was Harman, J.'s comment); the report of the proceedings in the subsequent appeal ([1959] 1 W.L.R. 250; p. 200, *ante*) showed that the tenants though unsuccessful would occupy the holding for nearly a year after the expiry of the original lease—and do so at the old rent. Harman, L.J., may have had this in mind when he said, in *Bolton's (House Furnishers), Ltd.* v. *Oppenheim* [1959] 1 W.L.R. 685; p. 634, *ante* (C.A.), that so long as the tenant can think of an expedient for agitating the courts on these matters he is allowed by the transitional provisions of the Act to remain in possession, paying the old, and almost inevitably lower, rent.

In *Frederick Lawrence, Ltd.* v. *Freeman, Hardy & Willis, Ltd.*, it was the landlords who considered that the provision might be useful, for the effect, it was argued, would be to make the disqualifying enactment in s. 30 (2) inapplicable. "Finally disposed of": this may not happen until the case has been adjudicated on by the House of Lords, as the definition in s. 64 (2) shows. (The hearing in the Court of Appeal began on 3rd June, 1959, but judgments were delivered on 2nd July, just over five years after what had been held to be the date of the purchase of the interest.)

It seems fair to say that there were weighty arguments for and against incorporation of the s. 64 provision in s. 30 (2), and that it was common sense that tipped the balance in favour of the tenants. It was, for instance, urged that when Parliament had wanted to exclude s. 64, it had done so expressly: s. 37 (7)—the section deals with compensation when a new tenancy is refused for specified reasons—says that in that section the reference to the date of termination is a reference to the date specified in the landlord's notice to terminate or tenant's request. There is no such provision in the case of s. 30 (2). As against this, there is s. 31 (2): this permits of a substitution by the court of a later date for the date specified in a landlord's notice to terminate if he has unsuccessfully opposed an application on the intention to demolish, etc., ground of, *inter alia*, s. 30 (1) (*f*), but the court has taken the view that he would have succeeded if a later date had been specified. It seemed plain, Romer, L.J., said, that the draftsman was focusing his attention on the date specified in the landlord's notice.

The circumstances being such, observations made by Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners* [1953] A.C. 267 were held to apply to the situation: if two constructions of statutory language are reasonably possible that one will be adopted by the court which will avoid an absurdity resulting from the other. The absurdity in this case had been

illustrated earlier in the judgment, Romer, L.J., visualising a landlord of four years' standing serving a notice to terminate stating that he would oppose an application under s. 30 (1) (*g*); the tenant then applies for a new tenancy and defeats the landlord by invoking s. 30 (2); the landlord appeals, and the appeal is heard four years six months after the date on which the landlord had become such; the appeal is dismissed, but the landlord appeals to the House of Lords, and, as five and a half years have elapsed, s. 30 (2) no longer causes him any difficulty.

R. B.

HERE AND THERE

WATERY SIEGE

EVER since the fortunate processes of evolution (if that was how it happened) persuaded us to give up being sponges and denizens of the deep, to arise from out the azure main and, by a series of brilliant improvisations, to turn ourselves into the splendid fellows we now are, we land animals have lived in a state of siege, the envious siege of watery Neptune. Occasionally a cliff bastion would fall under the sapping and mining of the sea or the pounding bombardment of the stormy waves. Sometimes a glacis would be overrun and engulfed. Or the defenders might push their outworks into enemy territory and hold them. The Dutch are adepts at this. But never has there been a decisive break-in or break-out, unless one counts the legendary catastrophe that overwhelmed Atlantis or the unforgotten cataclysm which still lives in the tradition of Noah's flood. But, even after these, the siege continues. Neptune is still master in his elements and the best the besieged have been able to achieve has been to slip at peril through his lines.

TERRITORIAL WATERS

FOR a very long time, the defenders in this siege were far too deeply preoccupied with the business of maintaining their foothold on the land to theorise about extending their jurisdiction over the water. It was enough to assert the good old law, the simple plan, that he should take who has the power and he should hold who can. Then, as navigation and trade and war and peace between nations became regularised, tentative legal definitions began to take shape. Eventually it seemed to us in England in our simple straightforward way that the thing was settled. England was Top Nation; we were sure of that. England was the champion of the Freedom of the Seas; we were sure of that too. England's claim to jurisdiction over the water round her shores was limited to three miles. Therefore that must be the law. Then suddenly the most unexpected foreigners started to make the most surprising claims. Chile, away down in South America, and never, so far as we were aware, accorded a heavenly charter to rule the waves, asserted jurisdiction over a 200 miles belt of territorial waters, while even little Iceland pushed her claims out to twelve miles.

VARYING CLAIMS

ALL this has set the jurists re-examining the basis of the three miles limit. One piece of international folk lore would link it with the range of gun-fire, but, when Grotius first propounded it, contemporary cannons could not shoot that far. Sixteenth-century guns could carry further than one would imagine. Thus, during Wyatt's revolt, the rebels had to evacuate Southwark from fear of bombardment by the artillery in the Tower. But even as little as a hundred years ago 2,700 yards was regarded as a long shot and ranges of over 4,000 yards were an achievement of the eighteen-sixties. If effective artillery range really had been the agreed yard-stick for measuring territorial waters, international law on this point would have been a great deal simpler. Even quite early jurists had far longer ranges. Selden, for example, would have claimed for Britain jurisdiction over the whole of the North Sea, and at different times in the past Icelandic waters have extended to limits varying in distance up to thirty-two miles. Fishing interests, the exploitation of under-sea minerals, the control of smugglers and the exigencies of national defence are all factors which in a scientific age are likely to complicate the acceptance of a common law on this point. Too many factors spoil any pact.

FISH WAR WITH IRELAND?

ICELAND'S challenge to the British Navy and the consequent protraction of the fishing war has been something of a shock to our feelings as well as our pride. It is easier to start that sort of war than to stop it without loss of face and with prospects of future friendliness. The big fellow is in as difficult a position as the little one. But Iceland is not the only place where there are the makings of a fishing war. Ever since before the war the Aran Islanders off the Galway coast have complained bitterly that the poaching by British and French trawlers was depopulating their waters of fish. So far the preventive measures of the Irish Republic have not been as aggressive as the fighting temperament of the Irish would lead one to expect. On at least one occasion before the war police who boarded an offending vessel were kidnapped and carried off to Fleetwood. During the war, when the submarine menace kept the poachers away, the fisheries recovered, but since then the trouble has started again and there are dark hints of collusion with some of the local men. Perhaps it is that the Fleetwood men have only heard of the Irish Republic as a vague legend. There are those more highly placed than they who seem strangely ignorant of its topography. Only recently the British Ministry of Agriculture, Fisheries and Food sent out an emissary from Lowestoft to study the sharks off Achill Island on the coast of Mayo. The Irish authorities received him courteously but with restrained surprise, especially when he produced hundreds of official forms to be filled in locally. When they put themselves into communication with England to check the authenticity of his authority, it turned out that Lowestoft was unaware that Achill is in the territorial waters of the Republic. The emissary was at once recalled. Maybe Fleetwood knows no better.

RICHARD ROE.

Mr. DAVID SKINNER, solicitor, who for some years has been a partner with Messrs. Taylor, Simpson & Moseley, of Derby, is to join the firm of Messrs. Hill & Coxe, of Budleigh Salterton and Exeter, at the end of September.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Expediting Contract

Sir,—Dr. J. Gilchrist Smith is to be thanked most heartily by conveyancing solicitors for his articles on this question. He says that he makes his latest suggestions in an endeavour to carry the controversy further towards a satisfactory conclusion. May I therefore speak from my own experience?

I find that the "optional clauses" (giving a purchaser a limited right to rescind after making his local authority searches and inquiries) are used in a small minority of cases. It occurred to me when the insertion of a similar clause in the Manchester Law Society's Conditions of Sale was being considered that it might render rather difficult the position of a vendor who is selling his house and buying another. He does not want to commit himself to a binding contract to buy until he is sure that his purchaser is bound to him. Conversely, he wants to be as sure as is reasonably possible that before he commits himself to sell and give possession of his present house he has a house into which he can move. Of course, this apparent impasse is usually covered by asking his bank to provide what they term "a bridging transaction."

My point is that if the contract of the client's sale transaction contains the optional clause, he will not know until (under the Manchester Conditions) twenty-one days have elapsed from the date of the contract that the purchaser's time for rescinding has expired and the contract has become unconditional, and so the vendor may not wish to bind himself to his purchase contract (albeit conditional in a similar way) until such twenty-one days have elapsed. It has often seemed to me likely that this may be the reason for the comparatively infrequent use of these optional clauses, apart from inherent conservatism of conveyancing solicitors!

Similarly, I find that the method of the vendor's solicitor making the local searches and attaching them to the contract is rarely used. Very seldom, in my experience, will a would-be vendor consult his solicitor as soon as he decides to try to sell as, in prudence, he undoubtedly should. What most frequently happens is that he calls upon his solicitor and tells him that he has arranged terms with a purchaser and instructs his solicitor to act. Sometimes the first intimation is from estate agents who write to report terms they have arranged on behalf of the client. In either case the deeds have to be sought before the vendor's solicitors can draw the contract and often these are with a mortgagee. Time often runs, therefore, for many days before the contract can be drawn and this gives an opportunity for the vendor's solicitors to write to the purchaser or his solicitor (if then known) saying that the contract will be sent when the deeds are available and suggesting that the purchaser's solicitor might in the meantime be making his searches and inquiries from the local authorities. Incidentally, in some notorious cases in this area the estimate of up to four weeks for getting replies to such searches and inquiries, to which Dr. Gilchrist Smith refers in his last article, may well be only a little exaggerated, especially in cases where local authorities insist upon a plan, to which the purchaser's solicitor has no access unless he can borrow one from his vendor's solicitor who, in turn, cannot supply it until he gets the deeds.

Another reason which perhaps militates against the universal adoption of the practice of the vendor's solicitor making these searches in advance is that the purchaser may well still think it necessary to make an up-to-date search in addition. Occasionally, I receive a letter from estate agents saying that a client of mine has instructed them to find a purchaser of his house and suggesting that I might be preparing the contract so that when a purchaser is found no time shall be lost. If I then made the local searches many weeks or perhaps months might elapse before a purchaser is found and then his solicitors might well deem it prudent to make up-to-date searches.

In this area of chief rents and restrictive covenants and indemnity powers there is often an inevitable lapse of time while the purchaser's solicitor satisfies himself about these by a preliminary inspection of the deeds or of an abstract or extract and I find that this lapse of time runs concurrently with the time involved in making searches and often the two lines of preliminary inquiry take about the same time.

I am not intending to prolong this already long letter by making any positive suggestions, but merely seeking to put before your learned contributor certain facts of the vexed question which may not yet have come to his notice.

S. Clayton Breakell.

Manchester, 2.

Purchase Notices

Sir,—I would like to draw your attention to the article appearing on p. 646 of the issue dated 21st August relating to the provisions of the Town and Country Planning Act, 1959.

You refer at the foot of the page to circular number 48/59 which you state deals with the procedure to be adopted under s. 35 of the 1959 Act.

Having had occasion to deal with a purchase notice, I obtained a copy of the circular you mention and find that in fact it deals mainly with the provisions of s. 37 of the Act and not as mentioned in your article. Incidentally, the cost of the circular is 1s. 3d. and not 6d. as you state.

Paragraph 7 on p. 2 of the circular reveals that the appropriate circular dealing with s. 35 is in fact number 49/59 and as other practitioners may find themselves in a similar position perhaps you would like to publish a correction in The Solicitors' Journal.

P. L. Taylor.

Birmingham, 2.

[The circular number should have read "49/59".—Ed.]

"THE SOLICITORS' JOURNAL," 24th SEPTEMBER, 1859

On the 24th September, 1859, The Solicitors' Journal reported certain proceedings in the Sheriff's Court: "Mr. Buchanan addressed a few words to his Honour in reference to a subject of great importance, namely, that of the robing of solicitors and attorneys attending this court. He said: 'Your Honour will agree with me that the adopting of the suggestions of Mr. Kerr would be fraught with much good. People would be enabled to tell who was a solicitor or attorney if he wore those robes peculiar to his position. Your Honour is aware that in the existing state of affairs, there is some danger of other parties passing as attorneys besides those actually entitled . . . I have consulted with some gentlemen in the profession who attend here and they quite agree with me that the respectability and dignity of the court would be much enhanced by some attention to reasonable ceremonies. I may also say that it would be very much better if the usher of the court were to robe. It would materially facilitate his passage through the court and his presence would be better acknowledged. As we are anxious that the matter should be finally arranged before the October Sessions . . . I am convinced that your Honour will mention my remarks in the proper quarter.' Mr. Needham (who sat for Mr. Kerr) said: 'I quite agree . . . There cannot be the slightest doubt that the robes distinctive of the class should be worn and a harmless ceremony would be productive of great good'."

Personal Note

Mr. William Pybus, solicitor, of London, was married to Miss Elizabeth Janet Whitley on 12th September.

Wills and Bequests

Mr. Herbert Wood, for many years managing clerk of Messrs. Barbers, solicitors, of Harrogate, left £3,202 net.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note

House of Lords

TRADE MARK: REGISTRATION: DISTINCTIVENESS: REGISTRABILITY OF WORDS THE PHONETIC EQUIVALENT OF NON-REGISTRABLE WORDS

Electrix, Ltd. *v.* Electrolux, Ltd.

Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow

6th July, 1959

Appeal from the Court of Appeal.

This was an appeal by Electrix, Ltd., from an order of the Court of Appeal dated 14th March, 1958, reversing the judgment of Wynn Parry, J., dated 30th July, 1957, whereby he upheld a decision of the Assistant Comptroller acting for the Registrar of Trade Marks dated 21st January, 1957. By the said order the Court of Appeal ordered that the appellants' applications Nos. 690730, B.718162 and B.718163 for the registration of trade marks be refused. The appellants had applied to register the trade mark "Electrix" in respect of electric (that is, electrically-driven) apparatus as set out hereunder:—

Application 690730—14th July, 1950—Electric domestic vacuum cleaner and parts thereof included in Class 9.

Application B.718163—22nd May, 1953—Electrically-driven floor polishing machines.

Application B.718162—22nd May, 1953—Electrically-driven spraying machines and parts thereof included in Class 7.

The first application was for registration in Pt. A of the Register, and the other two applications in Pt. B. The substantial question in this appeal was whether the word "Electrix" was registrable as a trade mark for electrical apparatus in view of—(*a*) its close similarity to the word "electric" and its identity in sound with the word "electrics," both unregistrable words; (*b*) The use by other traders of the words "electrics" and "electrix" as part of their trading style to denote the nature of their business, that is, the goods in which they deal. Their lordships took time for consideration.

VISCOUNT SIMONDS said that he could conveniently state the problem to be solved by the citation of a single sentence from the judgment of the Court of Appeal ([1958] R.P.C. 176, 193, 194): "The doctrine as we understand it is that, if a given word is for any reason unregistrable in its proper spelling then, inasmuch as trade marks appeal to the ear as well as to the eye, the objection (whatever it may be) to the registration of the properly spelt word applies equally to a word which is merely its phonetic equivalent." Applying that view of the law to the facts of the present case, the Court of Appeal held that, "electrix" being the phonetic equivalent of "electrics," and that word being unregistrable, "electrix" also was unregistrable. In his (his lordship's) opinion, the proposition or doctrine of law upon which the Court of Appeal founded was accurately stated and supported by authority and reason, and it was correctly applied: see, for example, *In re Ripley & Son's Trade Mark* ("Pirle") (1898), 14 T.L.R. 299; *In re Crosfield & Sons' Application* ("Perfection") [1910] 1 Ch. 130; *In re Brock & Co.'s Application*, ("Orwoola") [1910] 1 Ch. 130. Accordingly, the appeal must be dismissed with costs. The other noble and learned lords agreed that the appeal should be dismissed. Appeal dismissed with costs.

APPEARANCES: *K. E. Shelley*, Q.C., and *John Whitford* (*Frere, Cholmeley & Nicholsons*); *Kenneth Johnston*, Q.C., and *Geoffrey Tompkin* (*Steadman, Van Praagh & Gaylor*); *P. J. Stuart Bevan* (*for the Registrar of Trade Marks*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law]

INCOME TAX: DISTRIBUTIONS MADE AFTER WORKING EXPENSES DEDUCTED

Racecourse Betting Control Board *v.* Young (Inspector of Taxes)

Same *v.* Inland Revenue Commissioners

Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Keith of Avonholm

29th July, 1959

Consolidated appeals from the Court of Appeal ([1958] 1 W.L.R. 705; 102 Sol. J. 468).

The Racecourse Betting Control Board was a corporation set up under the Racecourse Betting Act, 1928, to operate a totalisator on approved racecourses. The board established the totalisator fund pursuant to s. 3 (4) of the Act from a percentage of the moneys staked on the totalisator. Under s. 3 (6) the board applied this fund in accordance with schemes prepared by them and approved by the Secretary of State for purposes conducive to the "improvement of breeds of horses of the sport of horse racing" but subject to the payment thereout of "all taxes, rates, charges, and working expenses" and "the retention of . . . sums . . . " to meet contingencies. . . ."

The board included in their "working expenses" under s. 3 (6) of the Act "runners' allowances"—sums paid to racehorse owners who ran horses at any racecourse with which the board was concerned.

The board paid from the totalisator fund sums to racecourse owners for use by them in improvements upon such racecourses, subject to a substantial measure of control or supervision by the board in each case, sums to owners and trainers towards their expenses in bringing racehorses to those racecourses, sums to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, sums to assist those responsible in discharging the expenses of point-to-point meetings, and sums to assist and encourage racing under the rules of the Pony Turf Club.

It was conceded that the board was carrying on the trade of totalisator operator. Upjohn, J., held, overruling the special commissioners, that neither the runners' allowances nor the sums paid out of the totalisator fund were deductible as expenses laid out for the purposes of the board's trade as such totalisator operator within the meaning of s. 137 (*a*) of the Income Tax Act, 1952. The Court of Appeal affirmed that decision. The board appealed to the House of Lords.

VISCOUNT SIMONDS said that the difficulty in the case no doubt arose out of the somewhat anomalous position of the board, which was not that of an ordinary trading corporation. The same difficulty might well arise in the case of all nationalised industries. In such cases the distinction was likely to be obscured between expenditure made in order to earn profits of the trade and expenditure out of earned profits. It was often a fine distinction—see, for instance, *Mersey Docks & Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891, *Inland Revenue Commissioners* v. *Stonehaven Recreation Ground Trustees* [1930] S.C. 206, and in particular the observations of Lord Reid in the recent case of *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co., Ltd.* [1952] A.C. 401, 417, 418. But in the present case the line was clearly drawn by the Act itself, and the Commissioners had fallen into error because they had ignored its structure and assumed that the tax position was precisely what it would have been if the board was an ordinary corporation whose object was under its memorandum of association to carry on the trade of operating totalisators on racecourses and other objects incidental thereto, and nothing had been prescribed in regard to the distribution of its profits. He (his lordship) did not say—it was unnecessary for him to say—what the result would be if that had been the case, and there had been a similar finding of fact. Here, however, the Act distinguished between, on the one hand, the trading

activities of the board and its attendant expenditure and, on the other, the payments which were to be made out of any balance that remained. The payments or appropriations so made must accord with the directions of the Act and must be approved by the Secretary of State, and it would, as it appeared to him (his lordship), be inconsistent with its scheme and purpose to treat those very payments as expenditure made wholly and exclusively for the purpose of its trade. The same result was reached if the matter was looked at from a slightly different angle. It might be asked what was the trade which the board carried on. The answer was that it was the trade of operating totalisators on racecourses. It was the expenditure for the purpose of that trade which was deductible in computing the amount of its profits or gains. No doubt, as was held in *A.-G.* v. *Racecourse Betting Control Board* [1935] Ch. 34, the legitimate activity of the board extended to matters fairly incidental to its express powers, but the question in that case was solely one of *vires* and it was not to be regarded as an authority for saying that every activity which might indirectly result in an increased patronage of the totalisator was a part of the trade of the board. On the contrary, he (his lordship) would hold that, though the appropriations might benefit the board, it was no part of their trade to assist racecourse executives or to encourage racing in other ways. That was the object to which under the control of the Secretary of State the profits of their trade might be devoted. As to the so-called runners' allowance, he (his lordship) was clearly of opinion that such payments were not properly described as " working expenses " of operating the totalisators, but were payments which might be made out of the balance of the fund under an approved scheme. Without such approval they were *ultra vires* payments. For these reasons he would dismiss the appeals with costs. The other noble and learned lords agreed that the appeals should be dismissed. Appeals dismissed with costs.

APPEARANCES: *Charles Russell*, Q.C., *F. Heyworth Talbot*, Q.C., and *Desmond Miller* (*Simmons & Simmons*); *F. N. Bucher*, Q.C., *Alan Orr* and *H. H. Monroe* (*Solicitor, Inland Revenue*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law]

Chancery Division

SURTAX: ASSESSMENTS: DISTRIBUTION TO SHAREHOLDERS AFTER SURTAX DIRECTION

Inland Revenue Commissioners *v.* Hudspeth

Vaisey, J. 1st July, 1959

Case stated by the Special Commissioners of Income Tax.

A taxpayer was a shareholder in a company to which s. 245 of the Income Tax Act, 1952, applied. For the years ended 31st March, 1951 and 1952, the company made net profits of £8,032 and £7,019 respectively, on which were paid respective gross dividends of £2,300 and £2,500. In June, 1955, the Special Commissioners of Income Tax gave the company notice that they had computed its " actual income from all sources " for the purposes of assessment to surtax under s. 21 of the Finance Act, 1922, at £16,824 for the year ended 31st March, 1951, and at £15,906 for that ended 31st March, 1952. In February, 1956, the company passed a resolution that its profits for those years should, as they had been subjected to surtax, be distributed in the form of a dividend among the shareholders. The taxpayer received a gross dividend of £7,280, comprising sums which were the equivalent of the total of what had been apportioned to him out of the £16,824 and the £15,906 in subjecting the profits to surtax, which sum he included in his return for 1955–56. For that year he was assessed to surtax in the sum of £10,956 and claimed relief on the ground that, in computing for surtax purposes his total income for that year, the whole of the £7,820 should " be deemed not to form part " thereof under s. 249 (5) of the 1952 Act. In fact the company's commercial profits available for distribution during those two years, including exempted profits tax, amounted to £13,171, so that the rest of what was distributed in February, 1956, must have come from profits of other years. As the amount distributed exceeded available profits, the Commissioners offered to exempt from surtax £6,413, being the taxpayer's proportionate share of what could properly have been considered a distribution by the company of its income for the two years. This the taxpayer declined, appealing that his assessment be reduced. The Crown asked that it be adjusted to exclude therefrom £6,413 of the £7,820. The Appeal Commissioners reduced the assessment, holding that s. 249 (5), being intended to give relief, referred to a sum capable of distribution which would be equivalent to the company's " actual income from all sources " assessed and charged to surtax, so that relief was to be given to the whole amount—in the present case the £7,820—when subsequently distributed. The Crown appealed.

VAISEY, J., said that the words " any undistributed income " in s. 249 (5) referred to the income of the company, but the rest of the subsection dealt with the position not of the company but of the shareholders. That which was free from any further charge to surtax was something which had already been " assessed and charged to surtax " and unless he could show that he was being asked to pay surtax on money which had already been subjected to it, a shareholder did not come within the subsection. The shareholder in the present case could establish that with regard to only part, £6,413 13s. 6d. of the sum received from the company; the rest of the dividend, in so far as it was not referable to the years 1951 and 1952 and had been derived by the company from some source other than the profits and gains of those two years, had not been subjected to surtax, and with regard to that part the taxpayer was not entitled to any relief. The taxpayer could not claim that because the company was liable to surtax on the whole amount he ought to have a corresponding relief in respect of the whole sum. The object of the subsection was to ensure that the taxpayer should not have to pay surtax twice in respect of the same sum of money, and the key to it was that the undistributed income (meaning the income of the company assessed and charged to surtax referable to the relevant years) when distributed was to be deemed not to be part of the total income of the taxpayer: that was the whole operation of the subsection. The Commissioners came to a wrong conclusion and relief was limited to the sum of £6,413 13s. 6d. Appeal allowed.

APPEARANCES: *F. N. Bucher*, Q.C., and *Alan Orr* (*Solicitor, Inland Revenue*); *P. W. I. Rees* (*Nordon & Co.*).

[Reported by Miss J. F. LAMB, Barrister-at-Law]

THE SOLICITORS ACT, 1957

On 20th August, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of THOMAS MCCULLOCH SWEETMAN, formerly of No. 88 West Bar, Sheffield, and No. 99 Pinstone Street, Sheffield, and now of Bronte Cottage, Hathersage, Derbyshire, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry. The order came into operation on 31st August, 1959.

On 20th August, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that JOHN RONALD MCINNES, of 41 North John Street, Liverpool, be suspended from practice as a solicitor for a period of three (3) years from 1st September, 1959, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

LOCAL GOVERNMENT COMMISSION

The Local Government Commission for England are to start reviewing the local government structure of the South West on 1st December. This area comprises the geographical counties of Cornwall, Devon, Somerset and Gloucester and the Isles of Scilly.

COUNTY COURT JUDGES

His Honour Judge HERBERT, M.C., Q.C., has been transferred to Westminster County Court with effect from 21st September, 1959, in succession to His Honour Judge Malcolm Wright, M.B.E., Q.C., deceased. Judge Herbert is at present the Judge of the Brentford and Uxbridge County Courts, where he will be succeeded by His Honour Judge Sir SHIRLEY WORTHINGTON-EVANS.

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Cheltenham and Gloucester Joint Water Board Order, 1959. (S.I. 1959 No. 1575.) 5d.

County of Inverness (Loch Lee) Water Order, 1959. (S.I. 1959 No. 1579.) 5d.

Farm Improvements (Standard Costs) Regulations, 1959. (S.I. 1959 No. 1555.) 1s.

High Wycombe Water (Mill End Pumping Station) Order, 1959. (S.I. 1959 No. 1572.) 5d.

Import Duties (General) (No. 9) Order, 1959. (S.I. 1959 No. 1591.) 5d.

Leicester Water (No. 2) Order, 1959. (S.I. 1959 No. 1571.) 10d.

Livestock Rearing Land Improvement Grants (Standard Costs) Regulations, 1959. (S.I. 1959 No. 1556.) 11d.

London Traffic Prescribed Routes Regulations:—
(Reigate). (S.I. 1959 No. 1588.) 4d.
(Westminster) (No. 4). (S.I. 1959 No. 1566.) 5d.

Metropolitan Traffic Area (Drivers' and Conductors' Licences) Order, 1959. (S.I. 1959 No. 1587.) 5d.

Probation (Scotland) Amendment (No. 3) Rules, 1959. (S.I. 1959 No. 1578.) 5d.

Purchase Tax (No. 5) Order, 1959. (S.I. 1959 No. 1592.) 5d.

Register of Patent Agents (Amendment) Rules, 1959. (S.I. 1959 No. 1569.) 5d.

Sevenoaks and Tonbridge and Mid Kent (Variation of Limits) Water Order, 1959. (S.I. 1959 No. 1563.) 5d.

Southwold Waterworks Company, Limited Water Order, 1959. (S.I. 1959 No. 1564.) 4d.

Stopping up of Highways Orders:—
City and County Borough of Coventry (No. 9). (S.I. 1959 No. 1577.) 5d.
County of Derby (No. 16). (S.I. 1959 No. 1559.) 5d.
County of Dorset (No. 4). (S.I. 1959 No. 1574.) 5d.
County of Hertford (No. 4). (S.I. 1959 No. 1576.) 5d.
City and County Borough of Plymouth (No. 5). (S.I. 1959 No. 1560.) 5d.
County Borough of Stockport (No. 2). (S.I. 1959 No. 1567.) 5d.

Superannuation (Local Government, Social Workers and Health Education Staff) Interchange Rules, 1959. (S.I. 1959 No. 1573.) 8d.

Town and Country Planning (Development Plans) (Amendment) Regulations, 1959. (S.I. 1959 No. 1581.) 6d.

Tuberculosis (Scotland Attested Area) Order, 1959. (S.I. 1959 No. 1590.) 5d.

West Hampshire Water (No. 2) Order, 1959. (S.I. 1959 No. 1558.) 5d.

SELECTED APPOINTED DAYS

September
28th Family Allowances and National Insurance Act, 1959, s. 2.

October
1st County Court (Amendment) Rules, 1959. (S.I. 1959 No. 1251.)
County Court Districts (Long Eaton and Parish of Lymm) Order, 1959. (S.I. 1959 No. 1423.)
County Court Fees Order, 1959. (S.I. 1959 No. 1262.)

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Right of Light over Adjoining Land

Q. *A* is the owner of a leasehold house, in which she resides, which forms part of premises leased on 21st October, 1893, for a term of 999 years to her father and mother. The lease contains the following exception and reservation: "Except and reserved out of this demise all rights restricting the free use of any adjoining land or the conversion or appropriation at any time hereafter of such lands for building or other purposes obstructive or otherwise." The dwelling-houses erected on the land demised by the lease were erected at the time of or shortly after the granting of the lease. The land at the rear of *A's* house was acquired by the Postmaster-General on 27th June, 1941. There are windows in the back bedroom and kitchen of *A's* house overlooking the land now acquired by the Postmaster-General. The Postmaster-General is erecting a building on the boundary of his land at the rear of *A's* house which will obstruct the light to the kitchen window of her house. (*a*) Does the exception and reservation contained in the lease prevent an easement of light being acquired by prescription over the land now belonging to the Postmaster-General, as this adjoining land does not belong to the reversioner or a tenant of the reversioner, who cannot therefore take the benefit of the exception and reservation? (*b*) If an easement of light was acquired by prescription over the adjoining land prior to the acquisition of the land by the Postmaster-General in 1941 as there had then been over twenty years' continuous enjoyment of the right of light, is the Postmaster-General bound by such easement in view of the fact that s. 3 of the Prescription Act, 1832, does not bind the Crown?

A. (*a*) The wording "this adjoining land does not belong to the reversioner" leads us to assume that it did not belong to the reversioner in 1893 when the lease was executed. On this assumption the reservation cannot have been made for the purpose of preventing a right of light from being enjoyed over the adjoining land. On this basis a right has been acquired under the Prescription Act, 1832, s. 3. Even assuming the land now belonging to the Postmaster-General was owned by the reversioner in 1893 we would take the view that the reservation was not such a consent as would prevent a right being acquired thereafter under s. 3. The decisions are not easy to reconcile, but we think this reservation merely negatives any implied grant of light and does not operate as a consent for the future (*Mitchell* v. *Cantrill* (1887), 37 Ch. D. 56, and *Hapgood* v. *Martin* (1935), 152 L.T. 72). The wording in the lease is almost identical with that which was in issue in *Mitchell* v. *Cantrill*. (*b*) Assuming the right was acquired before the Postmaster-General purchased in 1941 we do not see any relevance in the point that s. 3 does not bind the Crown. Once the right is acquired and annexed to dominant land the manner of acquisition ceases to be relevant, and we know of no ground for arguing that it does not bind the Crown.

Executrix Assenting in her Own Favour Beneficially

Q. A mother by her will, after appointing *B* to be sole executrix, gave and bequeathed unto her only son certain property for "his father's use during his lifetime." The mother died on 30th July, 1918, and letters of administration with will annexed were granted to the father on 13th June, 1919, *B* having renounced probate. The father died on 6th December, 1928, and by his will he gave all his property to the son, but did not name any executor, and letters of administration were granted to the son on 21st December, 1928, as residuary legatee and devisee. The son has now died and by his will he gave all his property to *B* and appointed her the sole executrix. It is considered that on the true construction of the mother's will the above property may have been given by mother to son as trustee for father and, this being so and father only having a life interest and there being no gift over, there was an intestacy in respect of such property and, the mother having died before 1st January, 1926, the son was

entitled thereto as heir-at-law of the mother subject to the father's life interest. It is not considered that the legal estate vested in the son on 1st January, 1926, by virtue of para. 3 of Pt. II of Sched. I to the Law of Property Act, 1925, as the father was still alive. No conveyance was executed nor any assent signed in favour of the son. What do you consider is now required to be done in order to vest the property in *B* ?

A. 1. Assuming the property is freehold we consider that the effect of the devise was to pass to the father a legal estate for life. The application of the Statute of Uses to devises in wills was, before 1926, a matter of much difficulty. However, the wording requires the son to hold for his father's use, and there were no active duties to perform, and so we think the statute executed the use. You may care to refer to an article on this subject in the *Law Journal*, 3rd February, 1956, p. 67. 2. Assuming that the father entered into possession or took the rents and profits beneficially (in other words, exercised his life interest) from 1919 to 1925, we think there was an implied assent in his favour in respect of his (legal) life interest (*Wise* v. *Whitburn* [1924] 1 Ch. 460; Emmet on Title, 14th ed., vol. 2, pp. 468, 474). Consequently we do not think that at the end of 1925 the land remained vested in the father as personal representative and so the Settled Land Act, 1925, Sched. II, para. 2 (1) (Emmet, *op. cit.*, p. 31) did not apply. In our view the land vested in the father as tenant for life (Law of Property Act, 1925, Sched. I, Pt. II, para. 6 (*c*); Emmet, *op. cit.*, p. 35 *et seq.*). 3. On this basis we conclude that the legal estate vested in the son in 1928 as personal representative of the father. We are not fully informed of the contents of the mother's will but we think its effect may have been to give the freehold to the son beneficially subject to his father's life interest. In any event, as you suggest, the son took as heir-at-law subject to the father's estate. Again, assuming that from (say) early 1929 to his death the son entered into possession or receipt of rents and profits beneficially, we think an assent in his own favour would be implied (Emmet, *op. cit.*, p. 474, and First Supplement, p. 92). 4. Our final conclusion is that *B* as executrix of the son should assent in her own favour beneficially. Having regard to all the complications of this title and to the necessity of recording the facts from which earlier assents are to be implied, we would put this assent in writing and (contrary to our usual view) recite all steps in the title from the mother's will.

NOTES AND NEWS

COLONIAL APPOINTMENTS

The following promotions and appointments are announced in the Colonial Legal Service: Mr. S. D. ADEBIYI, Crown Counsel, Federation of Nigeria, to be Senior Crown Counsel, Federation of Nigeria; Mr. A. A. ADEDIRAN, Registrar of Titles, Federation of Nigeria, to be Senior Crown Counsel, Federation of Nigeria; Mr. H. BURROWES to be Magistrate, Antigua; Mr. F. O. C. HARRIS, Assistant Legal Draftsman, West Indies, to be Legal Draftsman, West Indies; Mr. D. A. S. HART to be Assessor, Income Tax Department, East Africa High Commission; Mr. A. A. HUGGINS, Magistrate, Hong Kong, to be District Judge, Hong Kong; Mr. B. J. JENNINGS, Magistrate, Hong Kong, to be District Judge, Hong Kong; Mr. B. O. KAZEEM, Crown Counsel, Federation of Nigeria, to be Senior Crown Counsel, Federation of Nigeria; Mr. M. J. G. LALOUETTE, Master and Registrar, Mauritius, to be Assistant Attorney-General, Mauritius; Mr. D. F. O'R. MAYNE, Crown Counsel, Hong Kong, to be Senior Crown Counsel, Hong Kong; Mr. L. P. MOSDELL, Senior Resident Magistrate, Northern Rhodesia, to be Puisne Judge, Tanganyika; Mr. M. J. J. L. RIVALLAND, Assistant Attorney-General, Mauritius, to be Solicitor-General, Mauritius; Mr. A. G. SHEARS to be Resident Magistrate, Nyasaland; Mr. B. J. WALKER, Crown Counsel, Federation of Nigeria, to be Senior Crown Counsel, Federation of Nigeria; Mr. A. W. E. WHEELER, Crown Counsel, Federation of Nigeria, to be Senior Crown Counsel, Federation of Nigeria; Mr. D. A. WILLIAMS, Assistant Attorney-General, Barbados, to be Assistant Legal Draftsman, West Indies.

BUILDING SOCIETIES

HOUSE PURCHASE AND HOUSING ACT, 1959

The following building societies have been designated for the purposes of s. 1 of the House Purchase and Housing Act, 1959: Cambridge Building Society, Dewsbury and West Riding Building Society, New Cross Equitable Building Society, Rugby Provident Building Society. The most recent list of building societies so designated was published at p. 698, *ante*.

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For articles up to and including 26th June, see Interim Index

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